and then work simultaneously to see if we might not be able to address some of these concerns.

I agree with the majority leader. We are close and perhaps we can find a way to accommodate many of the concerns raised on both sides of the aisle.

But perhaps at the same time we might be able to accommodate some Senators who have been waiting patiently to be able to offer amendments. If we could do that, perhaps that might even accelerate our progress.

I reiterate my sincere desire, and I think the desire on this side, to work in earnest and try to accommodate everyone and successfully complete this bill.

I yield the floor.

Mr. DOLE. Will the Senator yield? We are prepared to vote on the amendment of the Senator from Massachusetts. I do not think we need any additional debate on that. I am for it, not that it makes any difference.

Mr. KENNEDY. We are quite prepared to vote. I do not think we need additional time. We wanted to do that at the earliest possible convenience. We welcome the opportunity to have a rollcall vote.

Mr. DASCHLE. I think the distinguished Senator from New York will be interested in speaking to the amendment prior to the time we vote, but I am sure there could be some relatively brief time agreement that we could work out to accommodate him, and others, who may yet want to speak. But I do not think it will take that long. I suggest we do that.

Mr. DOLE. Why do we not agree to have the time between now and 3 o'clock equally divided and then vote at 3 o'clock? I think the Senator from West Virginia also wants to speak on some other issue.

Mr. BYRD. I can wait.

Mr. DOLE. Is that satisfactory?

Mr. DASCHLE. If the majority leader will let me consult with the distinguished Senator from New York, Senator MOYNIHAN, to see how much time he may require, we can resolve this matter very soon.

Mr. DOLE. While the minority leader is checking, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. BYRD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

FIRST 100 DAYS OF SO-CALLED REVOLUTION

Mr. BYRD. I thank the Chair.

Mr. President, tomorrow we will hear about the first 100 days of the so-called revolution, and about the success of the misnamed contract with America. I call the contract misnamed because so many Senators on both sides of the aisle claim never to have signed it, and many Americans have no idea what it is, much less any idea of its various provisions. The term ''contract'' is usually reserved for binding documents which two or more parties have agreed to and signed. But, not so with this so-called contract with America. It is simply the wish list of the extreme faction of one political party, packaged to sell better by giving it the legitimacy of the word ''contract.'' It is clever, essentially meaningless ad-man lingo, probably conjured up by some pollster.

But, in any event, the Nation will, no doubt—at least part of the Nation—be glued to the TV sets on Friday evening to hear the 100-day report on the progress of the so-called contract, as promised. But everything about this made-for-TV drama will be somewhat of a fantasy.

First, as I have already indicated, the contract is merely a made-up device. Second, the so-called 100-day report is not occurring after 100 days. Friday, April 7, will only be the 94th day since the convening of the 104th Congress. The real 100th day will occur on Thursday, April 13th, smack in the first week of the April congressional recess. So we will be getting the report on the so-called contract, which is not really a contract, on the so-designated 100th day, which is really only day 94. But, then of what import are messy details when one is busy manufacturing non-news while conducting a pseudo revolution?

We will undoubtedly hear of the wild success of the so-called contract when, in fact, only two of its provisions have been enacted into law, and these two were relatively noncontroversial. In reality, two of the contract's major tenets, the balanced budget amendment and the term limits proposals have gone down to defeat, while a third, a misnamed proposal being loosely called line-item veto which, by the way, may be found to be unconstitutional, may be stuck in a House/Senate conference for perhaps a long time. Only in Washington would this type of report card be touted as successful. Rather than a 100-day report on the progress of the contract, this coming performance might be better billed as a 94-day alibi for the failure of an extremist agenda.

The truth of the matter is that the so-called contract is pretty much of a flop. And just like a bad play in the theatre, a bomb is a bomb. You can punch up the dance numbers, spice up the dialog and gussy up the costumes a little bit, but in the end a flawed script will flop and nothing on God's green earth will save it.

Likewise, at the end of this particularly bad show this so-called contract will also be judged a flop and a failure. That will happen because the contract is a giant gimmick comprised of other lesser gimmicks, and it does not address real problems in our Nation. It merely packages several old canards which are holdovers from the last popular Republican administration and calls them reform. It reruns a lot of 1980's political bumper sticker slogans and calls them a program for change. The Revolution has come to Washington! Rejoice all mad-as-hell citizens! Well, if this is a revolution, it must certainly be called the retread revolution. Term limits, balanced budget amendment, line item veto, enhanced rescission, separate enrollment, tax cuts—there is a tough one; there is a tough one—all of these old bald tires have been around for years.

And what about those tax cuts? Mr. President, earlier this year the House of Representatives passed the balanced budget constitutional amendment in just 2 days—2 days. A similar measure failed to pass the Senate by only two votes. During the debate on these proposals, Republicans nearly drowned the American people in a sea of rhetoric proclaiming the need for such an amendment.

Deficit reduction, it was claimed, was the most pressing issue facing Congress today. We heard a lot about our responsibility to future generations, about the need for fiscal discipline, and about the need to make tough choices. The American people were told that there would be shared sacrifice among all for the good of the Nation. Everyone was going to do his fair share to beat back the economic dragon of deficit spending.

For weeks we heard lofty speeches in this body over the need to reduce deficits. Now, for the House to come right along behind that debate and enact a huge tax cut financed by cuts in general spending makes a mockery of all the hot air we heard in this body about deficit reduction. To suggest squandering our budget savings on tax favors for the well to do and for big corporations is just plain crazy. For the House of Representatives to pass a tax cut giveaway which will cost the American people $189 billion over 5 years and approximately $700 billion over 10 years is clearly walking away from any serious attempt to reduce the deficit.

We will hear a lot of talk about the winners and the losers under the so-called contract in the coming days. But, in my view, there are no winners when what should be a serious attempt to address the Nation's problems is replaced with glitzy media shows, overblown rhetoric, one-line solutions, and junk legislation enacted in a rush to meet a phoney deadline, and huge tax cuts designed to benefit the well to do. We all lose. We all lose when that kind of superficial excuse for leadership is offered to the people as a substitute for the real thing.

The truth is that Barnum and Bailey's is not the only show in town this week. All of this touting of a revolution and praising of a nonexistent contract with America is nothing more than a less entertaining version of the same sort of circus.

This contract is a sham and it will ultimately be judged a failure because the American people will never choose the so-called contract over the Constitution, the Constitution of the United States of America. It will fail because it is mostly form devoid of substance. It will fail because it opts out of trying to find solutions to real problems, and instead tries to rig the game and rearrange our cherished checks and balances in order to further a misguided political agenda. And it will fail because it plays on people's fears and anger, instead of nourishing their hopes and their dreams.

It will also fail, I believe because of the genius of the Framers in their crafting of a U.S. Senate, designed to slow things down, educate the public and talk things through in extended debate.

For my part, I only wish that tomorrow night, instead of the touting of some made-up, fabricated so-called Contract With America in a partisan attempt to manufacture fervor for a political agenda, the American people will hear a detailed explanation of how the last 94 days have once again demonstrated the innate wisdom, power, and grandeur of the only contract ever agreed to by the people of America and sworn to by all of the Members of the Senate and the House. That contract is the Constitution of the United States of America.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The minority leader is recognized.

Mr. DASCHLE. Mr. President, I have consulted with colleagues on this side and I think as a result of our discussions in recent minutes that we will be able to enter into a fairly short-time agreement on this particular amendment.

Whatever length of time the distinguished Senator from Massachusetts would like to speak I think will be all the time required on this side. We would be prepared to vote.

Mr. KENNEDY. Mr. President, could we have 15 minutes, evenly divided? I will be glad, as I had previously indicated to the leadership, make a brief presentation. And I am glad to accommodate the timeframe. I could complete my statement in a shorter period, or take a few extra minutes.

I will be glad to begin, and when the leaders work out a time agreement, I will accommodate it.

Mr. DASCHLE. Mr. President, I suggest the Senator begin his remarks, and in the meantime we will try to work out an agreement.

AMENDMENT NO. 448 TO AMENDMENT NO. 420

(Purpose: To state the sense of the Senate regarding tax avoidance by certain former citizens of the United States)

Mr. KENNEDY. Mr. President, in a few moments, we will consider the amendment numbered 448. To again familiarize the Members of the Senate of its intent, I will read it. It is a brief amendment.

This amendment states that it is the sense of the Senate that Congress should act as quickly as possible to amend the Internal Revenue Code of 1986 to provide for taxation of accrued gains at the time that a person relinquishes U.S. citizenship; and it is the sense of the Senate that the amendment referred to should take effect as if enacted February 6, 1995.

This is defined as the billionaires' amendment.

Just to review the amendment very quickly, Mr. President, it was part of the small business health care deduction bill to permit the self-employed to deduct 25 percent of their premiums.

It had been included by the Finance Committee, and was a part of the legislation which we passed. This provision addressed a serious loophole in the Internal Revenue Code.

That loophole can be explained as follows: An individual can accumulate massive sources of wealth, owe their fair share of taxes to the Internal Revenue Code, renounce their American citizenship, become what I consider to be a Benedict Arnold, change their residency to another country, and effectively avoid and evade any responsibility to pay their fair share of taxes on all unrealized gains.

It has been estimated that the cost of this tax avoidance is $3.6 billion, including both American citizens and permanent resident aliens.

It is important to note that the measure reported out of the Finance Committee related only to American citizens. I am hopeful that the Finance Committee and the Ways and Means Committee, when they revisit this issue, will consider the administration's proposal, which would include both American citizens and permanent resident aliens.

This provision only affects about 25 Americans a year. But the cumulative loss to the Federal Treasury is $1.5 billion over a 5-year period and $3.6 billion over a 10-year period.

This matter is of major importance, Mr. President, because the Senate is now debating the rescissions legislation, rescissions meaning cuts in a number of different programs. These are programs that the Congress has authorized, and for which we have made appropriations. The President has signed these measures into law, and now Congress is revisiting these commitments and deciding how to cut the various programs.

The Daschle amendment that is before the Senate would restore funding for some of these programs: the voluntary community service program called AmeriCorps; the drug-free schools program, which assists parents, schoolteachers, and school boards with the problems of substance abuse and violence in the schools; the chapter 1 education program, which assists disadvantaged children; the Goals 2000 Program, which would provide sufficient funding for 1,300 school districts around the country for needed reforms and improvements in academic achievement; the well-known Head Start Program, that has been extended to 0- to 4-year-olds, so that intervention can take place to help children, particularly toddlers, as defined by the Carnegie Commission report; the Program for Women, Infants, and Children [WIC], which provides expectant mothers with high-quality nutrition; the School-To-Work Program, that is being reviewed now before our Human Resources Committee and will provide one-stop shopping for youth trainees; and the child care program, which is so essential for working families to ensure that their children are adequately cared for.

The amendment restores approximately $700 million in these programs. Other programs in the amendment for training and housing total $700 million. That requires a restoration of $1.4 billion, and we have spent days debating this amendment. By and large, most members of the Senate have voted in favor of these programs. A handful have not, but by and large it has been a bipartisan effort.

At the same time, we are not recovering the $1.4 billion from those Americans who are renouncing their citizenship and turning their backs on America. If they were not renouncing their citizenship, they would owe that money to the Federal Treasury. We have not recaptured that money. It was dropped in the conference committee on the small business legislation. The small business legislation with the appropriate language, which had been accepted in the Finance Committee, accepted on the floor of the Senate, and went to the conference, came back without the necessary language.

With this amendment, we are saying that the membership feels that this loophole must and should be closed, and will be closed at the first opportunity. And the date will be made retroactive to the date of original introduction by President Clinton, who has taken a personal interest in closing this loophole.

The majority leader has indicated that he will support it. The chairman of the Finance Committee has said that he will support it. The Senator from New York, Senator MOYNIHAN, as well as Senator BRADLEY and other members of the Finance Committee, have all expressed their support.

The vote is important because we want to make sure that the Senate's hand is strengthened when the measure goes to conference. Hopefully, this will be a unanimous vote, which will further strengthen the hand of the Senate. It will be a clear indication that the Senate of the United States wants this loophole closed, and that the renunciation of citizenship, after an individual has taken advantage of the American free enterprise system, and the avoidance of the responsibility to pay a fair share of taxes, is unacceptable.

An individual has every right to renounce his or her citizenship and leave America, and we have some 800 every year who do so. We are not saying that they cannot leave. We are saying that if they decide to leave, they should pay their taxes prior to their leaving.

Mr. DORGAN. Mr. President, I wonder if the Senator will yield for a question?

Mr. KENNEDY. Yes. Let me finish with one thought.

This provision is not a new concept. The concept itself is already included in the Internal Revenue Code but is drafted such that it does not protect against this egregious loophole. This new provision will close the loophole.

I am glad to yield.

Mr. DORGAN. I appreciate the Senator yielding. I know he has been waiting for a week to offer this sense-of-the-Senate amendment. I know also this was dropped from a previous piece of legislation that has been through this Chamber and I cannot conceive of anyone in this Chamber who would vote against this proposition.

As I understand the current tax law—and I might ask the Senator to confirm this—that if you have accumulated substantial assets and wealth in this country and have substantial gains on those assets and then decide to renounce your citizenship and leave the country, we'll give you a special deal. You do not have to pay tax on the way out on your gains.

I am going to bring something to the floor later this session on another perverse tax incentive that says, ''Close your manufacturing plant in America and move it overseas and we will give you a tax break for that as well.''

As I understand it, what the Senator is offering is a sense-of-the-Senate amendment saying let's close the loophole by which people can renounce their citizenship and leave this country with substantial amounts of accumulated gains in income and end up paying no taxes. Is that the current tax circumstance?

Mr. KENNEDY. The Senator has stated it accurately and correctly. It is a provision that is probably as inoffensive to all fair-minded Americans as any other before this body. As we debate our priorities on the floor, we have an opportunity to reduce the deficit or invest these resources in our children and our educational system.

We can give a clear, resounding message to our members of the Finance Committee so that this egregious loophole will be closed at the next possible opportunity.

Mr. DOLE. Is the Senator prepared to vote at, say 5 after 3?

Mr. KENNEDY. I will be glad to vote at 5 after 3.

Mr. DOLE. Up or down on the amendment?

Mr. KENNEDY. I appreciate that.

Mr. President, I call up amendment 448.

The PRESIDING OFFICER. Without objection the pending amendments will be set aside.

The clerk will report this amendment.

The bill clerk read as follows:

The Senator from Massachusetts [Mr. KENNEDY] proposes an amendment (No. 448) to amendment No. 420.

Mr. KENNEDY. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

At the appropriate place in the amendment, insert the following:

SEC. . SENSE OF THE SENATE REGARDING TAX AVOIDANCE.

(A) IN GENERAL.—It is the sense of the Senate that Congress should act as quickly as possible to amend the Internal Revenue Code of 1986, to eliminate the ability of persons to avoid taxes by relinquishing their United States citizenship.

(b) EFFECTIVE DATE.—It is the sense of the Senate that the amendment referred to in subsection (a) should take effect as if enacted on February 6, 1995.

Mr. DOLE. Did we get the yeas and nays?

The PRESIDING OFFICER. We have not gotten the yeas and nays.

Mr. KENNEDY. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. The yeas and nays are ordered, vote at 5 after 3.

Mr. KENNEDY. Mr. President, I will be glad to yield the floor if others want to address the issue. I will just take a few moments to mention one or two other facts.

The question was raised about this provision's constitutionality. I will place more complete statements in the RECORD, but I will now note the opinions of three very thoughtful international law experts. Prof. Andreas Lowenfeld of NYU said:

I am confident that neither adoption nor enforcement of the provision in question would violate any obligation of the United States or any applicable principles of international law.

Prof. Detlev Vagts of the Harvard Law School said:

The proposed tax does not amount to such a burden upon the right of repatriation as to constitute a violation of either international law or American constitutional law. It merely equalizes over the long run certain tax structures.

And Michael Matheson, a legal advisor at the State Department, said:

This provision does not conflict with international human rights laws concerning an individual's right to freely emigrate from his or her country of citizenship . . . . These are comparable taxes to those which U.S. citizens or permanent residents would have to pay were they in the United States at the time they disposed of the assets or at their death.

The overwhelming international law opinion on this measure is that it in no way restricts the constitutional right of exit or of renunciation of one's citizenship.

These international law experts understand this measure, and recognize that these individuals have accumulated this wealth through the American economic system, and have a responsibility to pay their fair share of taxes. As they understand it, the amendment would only recover what is owed to the Internal Revenue Service, which is part of one's responsibilities of citizenship.

Mr. President, we have appreciated the strong support that we have received on this measure.

This matter was brought to the attention of the President of the United States a number of months ago, and he personally pursued it with the appropriate committees and the Treasury Department. Through his individual oversight, the matter was spotted and will be corrected.

With the vote today, we are telling our good friends in the House of Representatives that we are serious about this measure, and that it is a significant issue of justice. The renunciation of one's citizenship is deplorable, but it is a right that we respect. But the renunciation of citizenship by individuals so that they do not have to pay their fair share of taxes is wholly unacceptable. It is sufficiently compelling to generate a resounding vote.

Mr. President, I would just take another moment of the Senate's time. We were questioned earlier about the revenue estimates. It is interesting that the figures of both the Senate Finance Committee and the administration are very similar. The administration's proposal estimated a cost of $1.5 billion, and the Finance Committee estimated a cost of $1.359 billion. Those figures are remarkably close. The Finance Committee's estimate was less than the President's figures because the Finance Committee estimated the cost for only American citizens, not permanent resident aliens. If we included permanent resident aliens, the committee estimate would perhaps exceed the President's estimate. Nonetheless, we have two solid estimates approaching $1.5 billion.

The President's proposal estimates a cost of $3.6 billion over a 10-year period. That is a very substantial amount, which, if not collected, will either add to the Federal deficit or deny us the opportunity to invest in our first order of priorities, our children and our education system, through the Head Start Program, the chapter 1 program, child care programs, job training programs, the student loan program, and our School-To-Work program. All of these programs reach out to the youngest of our citizens to make certain that they are going to get a healthy start, an even start, and a fair start in life, and be able to provide for themselves and for their own children in the future.

Mr. President, I ask unanimous consent that a November 21, 1994, article from Forbes magazine that explains this egregious tax loophole be printed in the RECORD.

I look forward to the vote itself.

I yield the floor.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

[From, Forbes, Nov. 21, 1994]

THE NEW REFUGEES

(By Robert Lenzner and Philippe Mao)

''Over and over again courts have said that there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor, and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions. To demand more in the name of morals as mere cant''—Judge Learned Hand.

''I talk to a new client interested in expatriating every week. Many people can't pay the federal tax rate and live in the style they want.'' So said Francis Mirabello, the head of the personal law department at the Philadelphia office of Morgan, Lewis & Bockius, speaking at a Bermuda conference on offshore money early this fall.

Expatriating? Give up U.S. citizenship? Who in his right mind would give up his U.S. citizenship? Lots of people. You could practically fill a Boeing 747 with well-heeled U.S. citizens who have taken of foreign citizenship rather than submit to what Learned Hand called ''enforced exactions'' at a level that amounts to virtual confiscation. The exodus may speed up under an Administration that campaigned for office on a tax-the-rich platform.

In 1981 Ronald Reagan lowered taxes. The following year not a single American gave up his citizenship. In 1993 the expatriate community grew by 306 names.

The expatriates of recent years have included:

Michael Dingman, chairman of Abex, and a Ford Motor director. Dingman is now a citizen of the Bahamas and lives there.

Billionaire John (Ippy) Dorrance III, an heir to the Campbell Soup fortune. Dorrance is now a citizen of Ireland and lives there as well as in the Bahamas and Devil's Tower, Wyo.

J. Mark Mobius, one of the most successful emerging market investment managers. Born a U.S. citizen, Mobius has the German citizenship of his ancestors and lives in Hong Kong and Singapore.

Kenneth Dart, an heir to Dart Container and his family's $1 billion fortune. He is a citizen of Belize and works in the Cayman Islands.

Ted Arison, founder of Carnival Cruise Lines. He kept Israeli citizenship and now lives there.

These newer emigrants join others of longer standing, including Robert Miller, the co-owner of Duty Free Shoppers International Ltd. Miller has a British passport obtained in Hong Kong, though he was raised in Quincy, Mass.

The U.S. is virtually the only country in the world that imposes significant income and death taxes on the worldwide income and assets of every citizen, even if the citizen is domiciled elsewhere. Even Canada, semisocialist, did away with estate taxes.

''Expatriation has been called the ultimate estate plan,'' says William Zabel, senior partner of Schulte Roth & Zabel, one of the nation's foremost authorities on trusts and estates, and author of the upcoming book The Rich Die Richer—And You Can Too.

The arithmetic is simple and brutal. A very rich Bahamian citizen pays zero estate tax; rich Americans—anyone with an estate worth $3 million or more—pay 55%. A fairly stiff 37% marginal rate kicks in for Americans leaving as little as $600,000 to their children. The marginal rate—what you pay on an additional dollar of assets—ranges upward from there to 60%. You get a credit for some or all of your state inheritance taxes, but your combined rate will still be in this range, or higher.

There are huge potential income tax savings, too, in giving up U.S. citizenship. St. Kitts-Nevis and the Cayman Islands, among others, levy no income taxes. Little wonder so many of the expatriate Americans have gone to the Caribbean for a year-round suntan.

Not that living in the Bahamas is any great sacrifice. Michael Dingman is building a 15,000-square-foot home at the exclusive Lyford Cay club in Nassau that will include a dock for his personal yacht. Cost: more than $10 million, but—who knows?—he might save more than that much in taxes.

The heirs of John (Ippy) Dorrance III, the Campbell Soup heir, won't have to pay Uncle Sam the maximum bite of 55% of the 26.7 million shares of Campbell Soup that make up most of his $1-billion-plus fortune. His new fatherland, Ireland, levies a 2% estate, or probate, tax. In any event, Dorrance doesn't escape the full federal income taxes. There's a U.S. withholding tax of 30% on the $30 million he gets in dividends every year from Campbell.

Many of these expatriates agonize over the decision, however. ''I have serious reservations about expatriation for patriotic and practical reasons,'' says tax expert Zabel. ''It is extraordinarily difficult for Americans to get back their citizenship once it is given up. To get it back you have to start like any other nonresident alien, with a green card, and go through the naturalization process.

''Before expatriating I make my clients consider all the limitations on loss of citizenship—like giving up the ability to travel to the U.S. more than 120 days a year.''

But losing that American passport isn't as hazardous as it once was. Profligate government policies are steadily eroding the value of the U.S. dollar, making overseas investments increasingly preferable for the wealthy. Investments in emerging markets look increasingly attractive. The end of the cold war means wealthy Americans can live in many developing nations safely. Global communication and jet travel facilitate an offshore lifestyle. What with computers and cable TV, you can be as well informed, and as quickly, living in Antigua as in New York City.

It certainly seems that way to Frederick Krieble, a director and former treasurer of Loctite Corp., the Rocky Hill, Conn. manufacturer of sealants and adhesives. Krieble, whose father, Robert, was formerly Loctite chairman, moved to Turks and Caicos Islands, where he runs an investment company. Krieble owns almost 1 million shares of Loctite, worth over $43 million.

''It's 85 degrees, but the market's down 35 points,'' Krieble told Forbes recently. When he heard we wanted to discuss the subject of expatriation, Krieble clammed up. ''I don't wish to discuss that. Have to run now.''

Yes, it's a bit embarrassing, but consider the consequences: decimation of your estate and huge reductions in your aftertax income.

Thus many money managers, senior executives and self-made entrepreneurs are on the phone quizzing their lawyers and accountants about how to leave the high-tax U.S.

Jane Siebels-Kilnes, a vice-president of Templeton, Galbraith & Hansberger, in Nassau, told Forbes she was ''following in the footsteps of Sir John Templeton,'' who gave up his U.S. citizenship in 1962 and moved to Nassau. Thus when Templeton sold his mutual fund management company in October 1992, he may have saved more than $100 million in capital gains taxes. Templeton, an extremely generous and public-spirited man, gives most of his money away. Apparently he wants to decide who gets the benefits rather than letting Donna Shalala or Mario Cuomo decide.

Siebels-Kilnes became a Norwegian citizen this year and moved her residence from Fort Lauderdale, Fla. to Nassau. ''I've spoken to a number of hedge fund managers who are thinking of giving up their citizenship. It may be better to be offshore running offshore money before American authorities clamp down on the advantages,'' says Siebels-Kilnes.

A hot spot: St. Kitts-Nevis. All it requires is owning $150,000 worth of local real estate and paying $50,000 in fees, and presto. St. Kitts-Nevis levies neither a personal income tax nor an estate tax.

Top executives of midwestern industrial companies nearing retirement are considering expatriation as a way to ensure a high standard of living in a comfortable environment.

Is it greed alone that impels these citizenship changes? Not necessarily.

''These people love to challenge all the rules, even recognizing they may isolate themselves,'' says Carol Caruthers, a partner of Price Waterhouse in St. Louis. ''We are doing preliminary planning for a few of them.''

Expatriation is a fairly easy choice for many wealthy Americans who hold dual citizenship—as Mobius already did—and whose wealth is heavily concentrated abroad anyhow.

''Since they may inherit these assets, a planning opportunity might be to give up U.S. citizenship in order to avoid taxation on assets and income that have no connection to the U.S.,'' says Robert C. Lawrence III, a Cadwalader Wickersham & Taft partner in New York who is advising on several such expatriations.

You'll need an ace attorney. If the Internal Revenue Service suspects you are renouncing your citizenship to avoid taxes, it will try to tax your holdings for another ten years, no matter where you live. All the IRS need establish is that it is reasonable to believe you gave up citizenship to avoid taxes. Then, the burden of proving the move was not for tax reasons falls on the former citizen.

But whatever the drawbacks, many nations put out the welcome mat for tax-averse Americans.

Lawyer Mirabello, who is working on six expatriations, is changing citizenship for a superwealthy Chinese-American whose headquarters is in Hong Kong. He has never set foot in the U.S. and wants to avoid estate taxes when he passes the empire to his children.

Some of Mirabello's clients are considering becoming Irish citizens. What does that require? Certainly no hardship, given what a pleasant place Ireland is for those with money. They need only buy a home there and reside there at least part of the year.

Why Ireland? An Irish passport lets its holder travel hassle-free in any member of the European Union. It also has more panache than a passport from Belize or St. Kitts, two small tropical outposts. And, Dublin is being developed as a global money center with tax advantages for individual and corporate investors.

How do you get an Irish passport? It should be fairly easy for the rich. New regulations will probably require a $1.6 million investment in a job-producing operation like the reforestation of an area or modernization of a shipbuilding concern. This is the so-called business migration scheme, administered in Dublin by the Department of Justice. Its guidelines are currently being reexamined for political reasons.

Another attractive destination is Switzerland. ''You can pretty well negotiate your own private agreement with a Swiss canton about your annual income taxes,'' asserts Lawrence.

Can an affluent American keep the politicians at bay without sacrificing citizenship? It's not easy. Wealthy people hold over $2 trillion in offshore accounts from Zurich to the Cayman Islands. No doubt some of these accounts are held by Americans who—illegally—omit mention of them on their tax returns.

Merrill Lynch, like all major investment firms, has a piece of this business. Merrill will not accept offshore accounts from U.S. citizens, but it is eager to service foreigners.

''Offshore money is growing faster than any other part of the financial services industry. It's multiplying at a double-digit rate of growth,'' says Nassos Michas, head of Merrill Lynch's private banking division. Merrill's trust bank in the Caymans, with assets growing at over $100 million a month, has almost $5 billion of wealthy individuals' holdings.

Actually, the Caymans trust is just a file for legal purposes. Merrill's banks in Geneva, New York and London hold the securities. The accounting is done in Singapore, the administration is done on the Isle of Man, famed for its trust business.

Wealthy Europeans, Latin Americans, Asians and Middle Easterners are Merrill's principal clients here. They want to buffer their fortunes against expropriation, political unrest, economic instability, angry first wives, kidnapping, family members, creditors and potential litigants.

Wealthy Europeans have expatriated their money to safety ever since the French Revolution, when they began hiding it in Switzerland.

When the Germans occupied the Netherlands in 1940, this activated a trust instrument transferring ownership from the homeland to a trust at a U.S. bank. In Europe, where the pounding of marching feet and air raid warnings are of recent memory, use of such trusts was common, at least up until the collapse of the Soviet Union.

Today many wealthy Kuwaitis have trusts offshore to protect their fortunes from Saddam Hussein. The rich in Latin America, Southeast Asia and the Middle East remember that it was only yesterday that their countries were ruled by thieving populists or arbitrary soldiers.

What is new is that Americans are beginning to feel the same sort of residual uncertainty about their posessions. They see courts eroding property rights. They read about bureaucrats who talk about ''tax expenditures'' when referring to that part of your earnings that they permit you to keep. They are subjected to retroactive taxation under the Clinton ''deficit reduction bill.'' They live in a society that changes the tax rules so frequently that long-term planning is almost impossible.

So they consult legal experts like Cadwalader's Lawrence, who is an authority on generational and international planning, including the use of trusts, and taxation. ''They want to sequester, organize and protect the privacy and maintenance of their wealth, plus the freedom to transfer it as they wish,'' says Lawrence.

But how, short of leaving for some sand dune in the Caribbean?

There are several clever strategies you can use to minimize the future tax bite on your estate, but the fact is that Congress has done a very thorough job of plugging chinks in the tax code. Parking assets abroad or setting up holding companies will not get you out of the U.S., steep income and estate tax rates. You really have to give up citizenship to get a big tax savings.

It's easier for foreigners who have property in the U.S. to avoid the worst of American taxation, but even for them there are pitfalls. They must pay U.S. estate taxes on assets held in the U.S. unless they safeguard them by means of an offshore legal structure. Only certain fixed-income investments are immune from the IRS.

A foreigner can shelter his U.S. assets in the following way: Set up a trust outside the U.S. in some tax-advantaged locale, such as Bermuda, the Cayman Islands or the British Virgin Islands. ''The foreign trust must own an underlying holding company, called a private investment company (pic),'' Lawrence says.

''The pic opens an investment account in the U.S. Otherwise, a foreign individual who has a stocks-and-bonds portfolio of U.S. companies would be subject to U.S. estate tax. If the securities are owned by a true foreign corporation, the individual is not subject to the estate tax. The foreign corporation acts like a shield to the estate tax.''

The IRS can't be happy about these paper shuffling arrangements. Indeed, Lawrence is afraid it may crack down on them. But before you cheer at the prospect of making them furriners pay up, remember this: The U.S. needs foreign capital because we don't save enough. We must compete for that capital with lots of other places. Treat the capital shabbily and it can go elsewhere.

''I'm afraid that foreign capital may be scared away from the U.S. because of taxes and the complexity of our regulation,'' Lawrence warns.

It could happen, Lawrence insists. He points to the Foreign Investment in Real Property Tax Act, passed in 1980, which forces foreigners to pay a capital gains tax when the sell real estate in the U.S. We shudder to think what would happen to the U.S. stock and bond markets if foreign paper holdings were similarly taxed.

It will come as a shock to many people to learn about the growing band of expatriates. But it is not unpatriotic to remind Americans that ours is no longer the only show in town as a place to invest. At a time when we urge developing countries to cut taxes and make capital more secure, a lot is happening to make it less secure and more heavily taxed at home. Those who give up their citizenship to escape Clintonomics and wealth redistribution are only the extreme part of a worrisome trend.

AVOIDING CONFISCATION

Short of renouncing citizenship, how do you protect the family fortune from confiscation by the tax code writers in Congress and in the U.S. Treasury?

The first, and easiest, tax-saving maneuver is to give money away while alive. If the heirs are young or irresponsible, you can put the gift in a trust and get the same tax advantages.

There are two advantages to gifts over bequests. One is that the first $10,000—per year, per recipient, per donor—is free from gift tax. If both you and your spouse give for a long time and you have many heirs, that exclusion can make a serious dent in your estate. With five heirs, two donors and 20 years to make the transfers, you can get $2 million out of your estate scot-free.

The other advantage is that the gift tax is somewhat lower than the estate tax. The two taxes use the same rate schedule, but the gift tax is calculated in a way more favorable to the tax-payer. Say you give $1 million to a grandchild when you are in the 60% bracket for federal gift tax. (That rate applies when your cumulative gifts, after the exclusion, are between $10 million and $21 million.)

The total cost of the gift will be $1.6 million—$1 million to the grandchild, $600,000 to the IRS. But at your death, that $1.6 million would be divided $960,000 (60% of $1.6 million) to the IRS, only $640,000 to the grandchild.

Caution. If you die within three years of making a gift, your taxes will be recalculated to negate the advantage of giving over bequeathing.

Another defensive maneuver is the grantor retained annuity trust (FORBES, Jan. 31). You transfer your business to a trust whose beneficiaries are your heirs. Out of the trust you carve yourself an annuity. The trust pays your annuity out of business earnings.

You figure the discounted present value of the annuity you retained, and subtract this amount from the value of the business in order to arrive at the value of the gift. The annuity gives you income while keeping your tax able gift to a minimum.

Business owners are also availing themselves of the ''minority discount'' rule (FORBES. Mar. 1, 1993) For example, your software firm is worth $10 million. Carve it up into ten shares and give one share each to ten heirs. Each share may be worth only $700,000 on a gift tax return, because no outside investor would want to be a minority owner in a family business.

If the family heirloom is a house, a variation on the GRAT may work well. You give your residence to your heirs, retaining the right to live in it for a specific period (Forbes, June 24, 1991). Again, the carve-out reduces the value of the gift.

Another innovation is the dynasty trust. Each grandparent puts $1 million worth of property in a trust in South Dakota for the benefit of grandchildren and great-grandchildren. Why South Dakota? Because it permits trusts to last in perpetuity; most states allow them to last no more than 21 years after the death of anyone now living. Why only $1 million? Because if you transfer more than that you will get hit with a punitive ''generation skipping tax.''

Note that a dynasty trust doesn't relieve you of the usual gift tax. It might, however, let you keep an asset in the family for a long, long time. The asset is hit with a transfer tax only once, when you set up the trust, rather than again and again as each generation passed on.

''There's no one device to solve all the problems. It's a combination of solutions,'' says Richard Covey, a partner at Carter, Ledyard & Milburn in New York. ''I find most wealthy people outside of New York don't know about these tricks.''

What about life insurance? The inside buildup of assets gets passed on to your heirs tax-free, but the premiums you pay must be reported as gifts. Life insurance is somewhat overtouted as an estate tool but it does have its advantages, especially if you die before your time.

You also can buy a tax-deferred annuity from a foreign life insurance company, typically German or Swiss. If the annuity is fixed rate and denominated in deutsche marks or Swiss francs, it may protect your nest egg from a deteriorating dollar (Forbes, June 20). You may also opt for a variable policy that is invested in stocks or mutual funds.

But you won't save taxes unless your estate administrator is willing to commit a felony by omitting it. So the main legal benefit of these overseas insurance policies appears to be that they may—repeat, may—be beyond the reach of creditors.

For a while the very wealthy were able to defer tax on portfolio profits by investing in overseas funds that had a majority of shares held by foreigners. But the 1986 tax put a stop to this game.

After the 1986 crackdown, the main thing that offshore funds can do for you is give your fund manager more flexibility in trading. Domestic funds must be diversified, must avoid getting too much of their profits from short term trading, and have limits on leverage. Foreign funds escape these rules, says Joel Adler, a partner in Sutherland, Asbill & Brennan in New York.

The bottom line is that there isn't much that wealthy Americans can do to protect their assets from a covetous state. Which explains, if it doesn't excuse, the drastic step taken by more and more people of giving up their U.S. citizenship. R.L. and P.M.

TAXATION OF EXPATRIATES

Mr. MOYNIHAN. Mr. President, I wish to speak to the matter raised by the distinguished Senator from Massachusetts. We should not countenance the evasion of taxes by those who renounce their citizenship. The Senate should act to address this problem expeditiously.

A genuine abuse exists. Although the current Tax Code contains provisions, dating back to 1966, designed to address tax-motivated relinquishment of citizenship, these provisions have proven difficult to enforce and are easily evaded. One international tax expert described avoiding them as ''child's play.'' Individuals with substantial wealth can, by renouncing U.S. citizenship, avoid paying taxes on gains that accrued during the period that they acquired their wealth and were afforded the myriad advantages of U.S. citizenship. Moreover, even after renunciation, these individuals can maintain substantial connections with the United States, such as keeping a residence and residing in the United States for up to 120 days a year without incurring U.S. tax obligations. Indeed, reports indicate that certain wealthy individuals have renounced their U.S. citizenship and avoided their tax obligations while still maintaining their families and homes in the United States, being careful merely to avoid being present in this country for more than 120 days each year.

Meanwhile, the rest of Americans who remain citizens pay taxes on their gains when assets are sold or when an estate tax becomes due at death.

It was this Senator who made the first proposal in the Senate to deal with the expatriation tax abuse. On February 6, the President announced a proposal to address the problem in his fiscal year 1996 budget submission. Three weeks ago, on March 15, during Finance Committee consideration of the bill to restore the health insurance deduction for the self-employed, I offered a modified version of the administration's expatriation tax provision as an amendment to the bill. My amendment would have substituted the expatriation proposal for the repeal of minority broadcast tax preferences as a funding source for the bill. The amendment failed when every Republican member of the Committee voted against it. Subsequently, Senator BRADLEY offered the expatriation provision as a freestanding amendment, with the $3.6 billion in revenue that it raised to be dedicated to deficit reduction. Senator BRADLEY's amendment passed by voice vote. That is how the expatriation tax provision was added to the bill that came before the Senate.

After the Finance Committee reported the bill, but before full Senate action and conference with the House, the Finance Committee held a hearing to further review the issues raised by the expatriation provision. Tax legislation routinely gets polished in its technical aspects as it moves through floor action and conference. At the Finance hearing, we heard criticisms of some technical aspects in the operation of the provision, as well as testimony raising the issue of whether the provision comported with article 12 of the International Covenant on Civil and Political Rights, which the United States ratified in 1992. Section 2 of article 12 states: ''Everyone shall be free to leave any country, including his own.'' Robert F. Turner, a professor of international law at the U.S. Naval War College, argued that the expatriation provision was problematic under the covenant. The State Department's legal experts disagreed, as did two other outside experts whose letters were before the committee. I refer to Prof. Paul B. Stephan III, a specialist in both international law and tax law at the University of Virginia School of Law; and Mr. Stephen E. Shay, who served as International Tax Counsel at Treasury under the Reagan administration.

Mr. President, I ask unanimous consent that the written testimony of Professor Turner, the written testimony of the Department of State, and the letters of Professor Stephan and Mr. Shay be printed in the RECORD at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. MOYNIHAN. Mr. President, although there was considerable support for the legality of the provision, I thought it best to proceed with caution in these circumstances. These are matters of human rights under international law, on which we have rightly lectured others, and involve our solemn obligations under treaties. I sought the views of other experts. Letters concluding that the expatriation provision did not raise any problems under international law were received from Prof. Detlev Vagts of Harvard Law School and Prof. Andreas F. Lowenfeld of New York University School of Law. The State Department issued a lengthier analysis upholding the legality of the provision, and the American Law Division of the Congressional Research Service reached a like conclusion. However, there were dissenting views, most notably Prof. Hurst Hannum of the Fletcher School of Law and Diplomacy at Tufts University, who first wrote to me on March 24.

Mr. President, I ask unanimous consent that the letters of Professors Vaghts, Lowenfeld, and Hannum, and the memoranda from the American Law Division of CRS and the Department of State, be printed in the RECORD at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 2.)

Mr. MOYNIHAN. Mr. President, this is where things stood when the House-Senate conference met on March 28. The weight of authority appeared to be on the side of legality under international law, but there was some question, and the bill had to move at great speed. As my colleagues well know, the legislation restoring the self-employeds' health insurance deduction, for calendar year 1994, needed to be passed and signed into law well in advance of this year's April 17 tax filing deadline, so that the self-employed would have time to prepare and file their 1994 tax returns. The decision regarding the expatriation provision had to be made without further opportunity of deliberation. I opted not to risk making the wrong decision with respect to international law and human rights.

The decision to drop the expatriation tax provision from the final conference version of the bill has been the subject of much debate over the last week. I certainly don't presume to speak for the other conferees. But for myself I repeat as I have said on two occasions on this floor over the past week: We should proceed with care when we are dealing with human rights issues, particularly when the group involved is a despised group—that is, millionaires who renounce their citizenship for money.

As the Senator who first proposed the expatriation tax provision, I will see this matter through to a conclusion. We are getting more clarity on the human rights issue, and it appears that a consensus is developing to the effect that the provision does not conflict with our obligations under international law. In particular, it is worth noting that Professor Hannum, who first wrote me on March 24 expressing his concern that the expatriation provision was a problem under international law, has, after receiving additional and more specific information about the expatriation tax, now written a second letter of March 31 stating that he is ''convinced that neither its intention nor its effect would violate present U.S. obligations under international law.'' This is the growing consensus, although it is not unanimous.

Mr. President, I would further ask unanimous consent that Professor Hannum's March 31 letter be printed in the RECORD at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 3.)

Mr. MOYNIHAN. Mr. President, as for criticism of the technical difficulties of the original proposal, I believe they can be satisfied. Indeed, I would venture that if some of those criticizing the provision's technical aspects had put even half as much effort into devising solutions as in highlighting shortcomings, we would already be much further along toward a satisfactory statute.

One final point, of utmost importance. As we take the time to write this law carefully, billionaires are not slipping through some loophole and escaping tax by renouncing their citizenship. The President announced the original proposal on February 6, and made it effective for taxpayers who initiate a renunciation of citizenship on or after that date. This was an entirely appropriate way to put an end to an abusive practice under current law. Both the proposal that I initiated, and the one that was ultimately adopted by the Finance Committee, also used February 6, 1995, as the effective date of the new provision preventing tax evasion through expatriation. The House conferees had proposed slipping the effective date to March 15, 1995—the date of Senate Finance Committee action on the provision. The two chairman of the tax-writing committees ultimately—and wisely—resisted that overture, and have issued a joint statement giving notice that February 6 ''may'' be the effective date of any legislation affecting the tax treatment of those who relinquish citizenship. Given the potential for abuse under current law, I believe that February 6 must be the effective date for a new rule. In any event, given the President's announcement in the budget, the Finance Committee action, and the joint statement of the two chairman of the tax-writing committees, individuals who are contemplating renunciation of their U.S. citizenship are on fair notice of the February 6, 1995, effective date.

To repeat, as the Senator who first offered the proposal to end the expatriation tax abuse, I will do everything I can to see that this matter gets resolved. We will do it this session. Fundamental justice to all taxpaying Americans requires no less.

In an effort to advance that goal, I will shortly introduce legislation embodying a revised expatriation tax proposal. I do so in the interest of ensuring that the issues that have been raised are addressed satisfactorily, and in a timely manner. This revised proposal represents a serious effort to address the criticisms that have been raised, and I believe it will be a major step forward.

Mr. President, we will end this abuse, and promptly, but in a careful and orderly way, as we should do in matters of this importance.

EXHIBIT 1.—INTERNATIONAL LAW AND THE ''EXIT TAX'': DOES SECTION 203 OF THE TAX COMPLIANCE ACT OF 1995 VIOLATE THE ''RIGHT TO EMIGRATE'' RECOGNIZED IN THE U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS AND OTHER U.S. AND INTERNATIONAL LEGAL INSTRUMENTS?

(By Robert F. Turner)

Mr. Chairman, it is an honor and a pleasure to appear before the subcommittee this morning to explore the human rights ramifications of the so-called ''exit tax'' contained in Title II of H.R. 981, the ''Tax Compliance Act of 1995.'' [1]

Before turning to the merits of the issue, I would like to make three caveats in connection with my appearance here today.

First of all, I am testifying in my personal capacity as a scholar interested in the subject of International Law; and, although I currently occupy the Charles H. Stockton Chair of International Law at the Naval War College while on leave of absence from the University of Virginia's Center for National Security Law, my appearance is unconnected with either of those relationships. Any similarities between the views I express and those of the War College, the Navy, the University of Virginia, or any other institution or organization, is purely coincidental.

Secondly, I want to stress the start that I have absolutely no expertise on the substantive issue of tax law. I will therefore have to pass on any questions you might wish to raise predicated upon such a knowledge.

Finally, since my invitation to testify was not extended until late Friday afternoon (four days ago)—and because of prior commitments and travel requirements, I had less than one day to work seriously on my testimony—my prepared statement is not as detailed as I might otherwise have preferred. The basic human rights issue is, of course, not new to me—ironically, I believe I first looked at the ''right of emigration'' professionally more than two decades ago when the Jackson-Vanik Amendment came before the Senate while I was on the staff of Senator Robert P. Griffin of Michigan—and I don't believe the pressures of time have prevented me from accurately setting forth the basic legal rules by which this statutory provision should be judged. I have not had a great deal of time for serious analysis, however; and while I venture some very tentative conclusions, I suspect that each of you will be able to apply the legal rules to the proposed new statute at least as well as I have been able to do in the limited time available. Candidly, I have gone back and forth on the issue—I don't find it to be a clear cut case.

Thus, I do not appear before you this morning for the purpose of either supporting or opposing the so-called ''exit tax'' provision of the tax bill. I do believe that upholding the rule of law is important, and I do believe that this provision may raise a sufficiently serious question under International Law that it warrants additional consideration before making a final decision on Section 201. To that end, I commend you for scheduling this hearing.

Even if in the end you conclude that the provision does not, in reality, violate the Nation's solemn human rights treaty commitments, if there is even a colorable claim to the contrary that might be raised to undermine future US efforts to enforce human rights laws, it might be wise to avoid even the appearance of violating these laws. In the end it may come down to balancing the importance of the tax code provision against the potential harm that might result if we are perceived as having violated these important rules of international human rights law.

As an aside, I also have a professional interest in issues of US Constitutional Law—indeed, I have testified before at least half-a-dozen congressional committees on issues of Constitutional Law in the past few years—and I have the impression that this provision may also raise issues in that area.[2] However, considerations of time, and my understanding of the scope of my invitation this morning, led me to refrain from examining those issues in sufficient depth to make a meaningful contribution today on that issue.

THE GROWTH OF A LEGAL RIGHT TO EMIGRATE

Today the right of citizens to renounce their citizenship and leave their own country is almost universally recognized as a fundamental civil right, but its widespread recognition as creating international obligations is of relatively recent origin. The origin of the right can arguably be traced back nearly 2500 years, to the famous Dialogues of Plato, in which Socrates says to Crito: [H]aving brought you into the world, and nurtured and educated you, and given you and every other citizen a share in every good which we had to give, we further proclaim to any Athenian by the liberty which we allow him, that if he does not like us when he has become of age and has been the ways of the city, and made our acquaintance, he may go where he pleases and take his goods with him. None of . . . [our] laws will forbid him or interfere with him. Any one who does not like us and the city, and who wants to emigrate to a colony or to any other city, may go where he likes, retaining his property.[3]

The 42nd paragraph of the original 1215 version of the Magna Carta issued by King John at Runnymede guaranteed the right of ''any one to go out from our kingdom, and to return, safely and securely, by land and by water, saving their fidelity to us''; but this ''right to travel'' was omitted from the forty-six subsequent versions—including the one issued by Henry III in 1225 usually associated with the term ''Magna Carta''—on the grounds that such a right seemed ''weighty and doubtful.'' [4] Nor, for that matter, is it clear that the right to ''travel'' included a right to emigrate—a right far more easily sustained now that people have changed from ''subjects'' of the King to ''citizens'' of the State.

In 1791, the French Declaration of the Rights of Man affirmed the right ''to come and to go'' from the State as a ''natural'' right.[5] By 1868 the U.S. Congress was on record by statute that: [T]he right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness. . . . Therefore, . . . any declaration, instruction, opinion, order, or decision of any officers of this government which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of this government.[6]

More recently, Section 349(a) of the Immigration and Nationality Act recognizes a right of every citizen to relinquish US citizenship.[7] Just a decade ago, the US Court of Appeals for the Ninth Circuit observed that ''expatriation has long been recognized as a right of United States citizens,'' and noted that ''the Supreme Court [has] placed the right of voluntary expatriation solidly on a constitutional footing.'' [8]

The proposed ''exit tax,'' of course, does not expressly challenge this well-established right to emigrate—it merely provides that a few very wealthy citizens will be forced to pay a 35% tax on appreciated assets should they wish to exercise this constitutional

[1] Footnotes at end of article.

right. The issue you have invited me to address is whether such a tax would bring the United States into noncompliance with any binding rules of International Law. I am not sufficiently versed on issues of tax law to answer that question with any real confidence, but perhaps I can be of assistance by at least summarizing the existing international law binding upon the United States concerning the human right to emigrate.

INTERNATIONAL LAW AND CONSTRAINTS ON THE RIGHT TO EMIGRATE

Mr. Chairman, perhaps it would be most helpful if I began by briefly setting forth the status of the right to emigrate under International Law. I will first consider the relevant conventional (treaty) law binding upon the United States, followed by a look at some ''nonbinding'' international documents which may shed light on these issues, and finally I will discuss the very important area of customary international law (which, under the Statute of the International Court of Justice, is considered as equal in authority to conventional law[9]).

CONVENTIONAL INTERNATIONAL LAW

The effort to codify international human rights law is of quite recent origin, essentially coming in the wake of World War II and the establishment of the United Nations. Article 55 of the UN Charter establishes as a goal the promotion of ''universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.'' In Article 56, ''All Members pledge[d] themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.''

An important first step was the unanimous adoption (with eight abstentions, including the Soviet Union and several other Communist States) on 10 November 1948 of the ''Universal Declaration of Human Rights'' as a UN General Assembly Resolution. Such resolutions do not have legal effect,[10] and the Declaration was clearly viewed as aspirational at the time—indeed, the United States delegate expressly stated that the resolution ''is not and does not purport to be a statement of law or of legal obligation.''[11] However, there is a very strong consensus today that the Declaration is legally binding by virtue of reflecting customary international law. It will be discussed below under customary law.

THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

In an effort to follow up the Declaration with a series of binding treaties, in 1966 the United Nations General Assembly unanimously approved the International Covenant on Civil and Political Rights, which entered into force on 23 March 1976. The following year, it was signed by the Carter Administration and on 23 February 1978, it was submitted to the Senate for its advice and consent.

In 1991, President Bush asked the Senate to consider the treaty, and hearings were held late that year in the Foreign Relations Committee, which recommended approval of the treaty by a unanimous vote (19–0). On 2 April 1992, the Senate consented to the ratification of the treaty with a variety of proposed reservations, understandings, and declarations[12]; and the instrument of ratification was deposited with the United Nations on 8 June of that year with the recommended additions—none of which apply directly to the issue at hand.[13] The United States thus joined more than 100 other States in assuming a solemn international legal obligation to abide by the terms of the Covenant.

It is perhaps worth noting that the unanimous report of the Foreign Relations Committee on this treaty categorized the ''rights enumerated in the Covenant'' as being ''the cornerstone of a democratic society.''[14]

The Covenant was designed to be a legally-binding international treaty setting forth ''inalienable rights'' which were ''derive[d] from the inherent dignity of the human person.''[15] Article 12 of the Covenant provides:

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. *The above mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others,* and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country. [Italic emphasis added.][16]

The American Society of International Law commissioned an excellent study of The Movement of Persons Across Borders, edited by two of the nation's foremost scholars in this area (Professors Louis B. Sohn and Thomas Buergenthal), which provides important background on the interpretation of the Article 12 of the Covenant. Among other things, the authors note that one of the reasons Article 12 was written was that, ''[n]otwithstanding Article 13(2) of the . . . [*Declaration*], some countries prevent their nationals from leaving, prescribe *unreasonable conditions such as exacting taxes or confiscating property* . . . [emphasis added]''[17]

While Article 12 embodies a ''fundamental right,'' it is not an ''absolute right'' in the sense that a State may not legitimately place some reasonable restrictions by law on the right of emigration. In addition to preventing individuals accused of serious crimes from leaving,[18] for example, it is clear that a State may require a citizen to pay any normal tax obligations or other public debts.[19] However, people who wish to emigrate may not lawfully be required to surrender their ''personal property,'' and ''Property or the proceeds thereof which cannot be taken out of the country shall remain vested in the departing owner, who shall be free to dispose of such property or proceeds within the country.''[20]

It seems to me that a key issue with respect to the proposed US ''exit tax'' is whether or not it represents a normal tax obligation applicable to all citizens irrespective of their wish to emigrate. To the extent that it constitutes a special requirement on individuals because of their desire to emigrate, then the Government would presumably have the burden under the Covenant of establishing that the law is ''necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others. . . .''[21]

It may be relevant that efforts were made during the drafting of Article 12 to broaden this list of permissible exceptions to include such concepts as promoting a State's ''general welfare'' and ''economic and social well-being,'' and these were rejected as being ''too far-reaching.''[22] Restrictions on freedom of movement were only to be permitted in ''exceptional'' circumstances.[23] Professor Louis Henkin, of Columbia Law School, has noted that: The Covenant . . . is not to be read like a technical commercial instrument, but ''as an instrument of constitutional dimension which elevates the protection of the individual to a fundamental principle of international public policy.'' Rights are to be read broadly, and limitations on rights should be read narrowly, to accord with that design.[24]

This view is widely shared by other experts in the field.[25] Discussing Article 12 in a lengthy 1987 article in the *Hofsta Law Review*, a group of four attorneys from the New York firm of White & Case concluded: Although it is accepted that there may be restrictions imposed on the right to emigrate, these restrictions are of an exceptional character and must be strictly and narrowly construed. The right to emigrate is primary; the restrictions on that right are subordinate and may not be so construed as to destroy the right itself.[26]

For the record, the United States is now also to the *International Convention on the Elimination of All Forms of Racial Discrimination*, which prohibits barring freedom of movement (and many other enumerated rights) on the basis of ''race, colour, or national or ethnic origin''[27]—however, this treaty does not appear to be relevant to the issue at hand. There are several other international conventions which guarantee the right to emigrate, including regional agreements underlying the European, African, and Inter-American human rights systems. However, the United States is not a Party to these, so in the interest of time I have not addressed their specifics. (While they do serve as evidence of customary legal obligations, in this area the statutory language of the Jackson-Vanik Amendment [discussed *infra*] assures that the United States is bound by customary law in this area.)

OTHER INTERNATIONAL INSTRUMENTS OF RELEVANCE

As already noted, the Universal Declaration of Human Rights was intended to be aspirational and not legally binding upon the 48 States that voted to approve it. Because it reflects customary law, it will be discussed under that heading—but it also stands as an important non-treaty human rights document.

Another very important international document clearly not intended to create binding legal rights was the Final Act of the Conference on Security and Cooperation in Europe (Helsinki Accords), which expressly incorporated the *Declaration*.[28] Time has precluded me from addressing these types of instruments further, but they are probably not critical to a resolution of the issue.

CUSTOMARY INTERNATIONAL LAW

Perhaps the most important written source of customary international law[29] is the *Universal Declaration of Human Rights*, approved as a UN General Assembly Resolution on 10 November 1948 and already noted above. The *Declaration* provides:

Article 13

1. Everyone has the right to freedom of movement and residence within the borders of each State.

2. Everyone has the right to leave any country, including his own, and to return to his country.[30]

During the debate on the Jackson-Vanik Amendment in 1974 (discussed infra), this document was occasionally portrayed as an international treaty designed to create legal rights.[31] In reality, its only ''legal'' value is as evidence of binding customary law. This may be important background for the discussion which follows, because the Soviet Union voted against Article 13 during the drafting process and did not vote in favor of the Declaration itself in the General Assembly. With a few exceptions, which are not relevant to the issue at hand,[32] rules of International Law are established by the consent of States. This can be done explicitly by ratifying a treaty or other international agreement, or it may be done implicitly by taking part in the development of a consistent and general practice accepted as law. But—again, with some exceptions[33]—a State is not considered bound by customary legal rules against which it clearly protested during formation. Thus, it is at least arguable[34] that the Soviet Union was not bound by the Declaration as customary law in 1974.

THE 1974 JACKSON-VANIK AMENDMENT

Mr. Chairman, it may be worth noting this Committee, and the United States Congress, have played a prominent role in the affirmation of customary international law governing the right of citizens to emigrate without having to pay burdensome special taxes. I believe that Chairman Packwood, Majority Leader Dole, and Senator Roth are the only current members of the Finance Committee who served in the Senate during the Ninety-Third Congress, so it may be useful to review the history of the ''Jackson-Vanik'' Amendment—also known as the ''Freedom of Emigration'' Amendment[35]—briefly at this time. I remember it reasonably clearly, for, as I mentioned, I was serving at the time on the staff of Senator Bob Griffin and I followed the Amendment closely.

As reported out of this committee, Section 402 of the Trade Act of 1974 (H.R. 10710) included the House-passed ''Vanik Amendment''[36] which prohibited the President from granting ''nondiscriminatory tariff treatment'' to any ''non-market economy country'' which ''imposes more than a nominal tax, levy, fine, fee or other charge on any citizen as a consequence of the desire of such citizen to emigrate to the country of his choice.''[37] In its accompanying report, this Committee referred to the ''right to emigrate'' as a ''basic human right. . . .''[38]

When the trade bill reached the Senate floor in mid-December 1974, this provision was strengthened by the enactment of the famous ''Jackson Amendment'' (with the final language affirming the right of emigration thus widely referred to as the ''Jackson-Vanik Amendment''). Although strongly opposed by the Ford Administration as an impediment to détente with the Soviet Union, and Jackson Amendment was introduced in the Senate with 78 co-sponsors.[39] Significantly, it received a unanimous vote after a lengthy (if entirely one-sided) floor debate.[40] The three current members of this Committee who served in the Senate at the time were co-sponsors of the Jackson Amendment[41] and voted for its passage.[42]

In testimony before this committee, the legendary Hans J. Morgenthau, at the time Leonard Davis Distinguished Professor of Political Science at the City University of New York, characterized the right of emigration as ''one of the tests of civilized government.''[43] Senator Dole termed it a ''fundamental freedom,'' and described the Soviet requirement that citizens seeking to emigrate first pay a ''diploma tax'' to reimburse the State for its investment in their education as being in conflict with ''America's traditional concern for the rights of individuals.''[44] Addressing the Senate following passage of his amendment, Senator Jackson noted that the ''fundamental human right to emigrate'' was guaranteed ''in the Universal Declaration of Human Rights which was adopted unanimously 26 years ago this week.''[45] As enacted into law (19 U.S.C.A. §2432), the provision provides in part: §2432. Freedom of emigration in East-West trade. . . . (a) To assure the continued dedication of the United States to fundamental human rights, and notwithstanding any other provision of law, on or after . . . January 3, 1995, products from any nonmarket economy country shall not be eligible to receive nondiscriminatory treatment (most-favored-nation treatment), such country shall not participate in any program of the Government of the United States which extends credits or credit guarantees or investment guarantees, directly, or indirectly, and the President of the United States shall not conclude any commercial agreement with any such country, during the period beginning with the date on which the President determines that such country—

(1) denies its citizens the right or opportunity to emigrate;

(2) imposes more than a nominal tax on emigration or on the visas or other documents required for emigration, for any purpose or cause whatsoever, or

(3) imposes more than a nominal tax, levy, fine, fee, or other charge on any citizen as a consequence of the desire of such citizen to emigrate to the country of his choice,

and ending on the date on which the President determines that such country is no longer in violation of paragraph (1), (2), or (3).[46]

Even if you conclude that the proposed exit tax is not in conflict with the terms of the Covenant on Civil and Political Rights, it strikes me that—given in particular this Committee's and the Senate's unanimous support for the Jackson-Vanik Amendment—careful consideration ought to be given to whether this proposal complies with that standard as well.

RECONCILING THE PROPOSED US ''EXIT TAX'' WITH JACKSON-VANIK

Subjectively, of course, all of us can presumably agree that there is a substantial difference in the motivation behind the proposed US ''exit tax'' and the impediments placed in the path of Soviet Jews (and others) in the early 1970s designed clearly to discourage emigration (especially by dissident Jews to Israel). The United States understandably does not wish to lose the substantial sums in tax revenues which the Treasury Department projects could be lost if especially wealthy US citizens elect to renounce their citizenship and emigrate to foreign points.

While one might normally view this as a ''political'' problem for Congress to factor in to the drafting of the tax laws—how to extract maximum tax revenues from the wealthy without exceeding the point that the ''geese that lay the golden eggs'' will fly off to find a more hospitable environment in which to do business[47]—there are obvious political attractions to the exit tax approach. Presumably few constituents will be directly affected by this legislation (and ''soaking the rich'' is not all that unpopular with many Americans of more ordinary means in these troubled times), and in order to be subject to the special ''tax'' an individual will have to renounce his or her American citizenship—in the process surrendering their right to vote in any case. One can see how this might have appeared to be a virtually cost-free (from a political standpoint) way to raise a couple of billion additional dollars over the next five or six years.[48]

From the standpoint of International Law, however, it may be more difficult to make the distinction between the old Soviet practice of charging a special ''diploma tax'' to compel citizens who wish to emigrate to compensate the State for its investment in their education, and the proposed US ''exit tax'' designed to compel citizens who wish to emigrate to compensate the State for income taxes they would likely eventually owe if they remained citizens. (It would not be illegal under these rules of International Law for the United States to tax unrealized capital gains annually, or for the Soviets to charge a fee for providing an education—the legal issue arises when people who seek to emigrate are treated less favorably than others because of their decision to exercise their legal right to emigrate.)

To be sure, we can probably agree that the old Soviet regime was made up of ''bad guys,'' and our own government is much ''nicer.'' Even as many of us search around for professional assistance in reducing our own tax liabilities, it is probably true that most Americans have a visceral antipathy for ''tax dodgers.'' Nor do many of us identify very closely with individuals who would voluntarily renounce their American citizenship as a means of reducing tax liability. While it may be in part that our relatively more limited liability makes their decision difficult to comprehend, I like to think that most of us view our status as American citizens as among our most cherished rights. Many of us still recall Sir Walter Scott's moving words, as we read them in high school in Hale's ''A Man Without a Country'':

Breathes there the man, with soul so dead,
Who never to himself hath said,
This is my own, my native land!
Whose heart hath ne'er within him burn'd
As home his footsteps he hath turn'd
from wandering on a foreign strand!
If such there breathe, go, mark him well;
For him no Minstrel raptures swell;
High though his titles, proud his name,
Boundless his wealth as a wish can claim;
Despite those titles, power, and pelf,
the wretch, concentered all in self,
Living, shall forfeit fair renown,
And, doubly dying, shall go down
to the vile dust, from whence he sprung,
Unwept, unhonor'd, and unsung.[49]

I suspect that the outcry from your constituents over the proposed exit tax—even if it is perceived as nothing more than an effort to ''stick it to rich expatriates''—is not likely to be very considerable.

CONGRESS MAY BY STATUTE VIOLATE INTERNATIONAL LAW

Perhaps I should make one additional point. The United States belongs to the dualist school and views municipal and international law as being separate, if often interrelated,[50] legal systems. United States courts will thus first attempt to reconcile the language of apparently inconsistent statutes and treaties, but if that proves unreasonable, they will apply the ''later in time'' doctrine (lex posterior derogat priori) and give legal effect to the instrument of most recent date.[51] The theory underlying this policy is that treaties and statutes have a co-equal standing as ''supreme law of the land,''[52] and the lawmaking authority—be it the two chambers of the Legislative Branch acting with the approval (or over the veto) of the Executive,[53] or the Executive acting with the consent of two-thirds of those Senators present and voting[54]—is presumed to know the existing law when it acts and to intend the logical consequences of its actions. Thus, if the Congress enacts the provision in question and it is subsequently challenged as contrary to the nation's solemn treaty commitments, American courts will not strike down the statute because of the treaty. Similarly, while some scholars quarrel with the rationale,[55] the oft-cited 1900 Supreme Court case of The Paquete Habana held that customary international law (''the customs and usages of civilized nations'') is part of US law ''where there is no treaty and no controlling executive or legislative act or judicial decision. . . .''[56] Furthermore, while the recently ratified Covenant clearly creates a solemn legal obligation upon the United States under International Law, it is not self-executing[57] and thus will not be implemented by US courts in the absence of independent legislative authority.[58]

However, this is not to say that Congress has the legal power to relieve the United States from its solemn treaty obligations under International Law. On the contrary, no such right exists (unless the relevant treaty provides for termination by act of a national legislature), and if the Congress elects to approve a statute that is contrary to the Covenant it will make the United States a lawbreaker.

To be sure, Congress in the past has on occasion enacted legislation which placed the Nation in such a status.[59] Such a decision has consequences, however. Not only might other treaty Parties have available meaningful remedies under International Law,[60] but violations of International Law by the United States contributes to a lack of respect for the rule of law in general and greatly undermines the ability of the United States to pressure other States to comply with such rules. Thus, in particular when the issue involves solemn undertakings in the area of international human rights, one would hope that legislators would be careful to avoid even the appearance of breaching provisions of a treaty.

CONCLUSION

Mr. Chairman, as I indicated when I began, I did not come here this morning with the intention of taking a definitive position on this legislation on the merit. Because the invitation to take part in the hearing came with such short notice, I have not been able to analyze the issue to the extent I might have wished. The comments which follow are offered with more than a little hesitation and uncertainty.

I have primarily tried to set forth the basic international legal rules in my testimony, and I suspect that honorable men and women might reach different conclusions when applying those rules to this bill. I came into the hearing with some reservations, but it may be that after I have heard other perspectives I will be less concerned about the compatibility of the "exit tax" with Article 12 of the Universal Covenant on Civil and Political Rights.

Even if that occurs, however, it still leaves us with the perhaps more difficult problem of reconciling this tax with the spirit and language of the 1974 Jackson-Vanik Amendment. I'm not going to pre-judge that issue for you, either, other than to say that I personally find it somewhat more troubling. If this were merely a statute providing that citizens must "pay their lawful taxes" before they may renounce their citizenship and move to a foreign State they find more attractive, I think it could pass legal muster with little difficult.[61] But I'm not sure that's the situation. You understand the tax system for better than I do, and I will defer to your expertise in the final analysis.

As I stressed at the beginning, I am not even arguably an authority on the tax code; but it is my initial impression that the proposed "exit tax" is designed to impose an immediate and substantial financial burden upon citizens—on the specific and expressed grounds that they have elected to renounce their citizenship and emigrate—and that this is a burden that would not be imposed upon otherwise identically situated citizens who elected to remain American citizens (and did not elect to sell or dispose of their property or take other action that would realize capital gains liability).

If that is true, in all candor, I think I would want my money "upon front" if I were asked to argue before an international tribunal that the proposed US exit tax complies with the spirit of the Jackson-Vanik Amendment—which no less an authority that the United States Congress argued reflected the minimal requirements of International Law two decades ago. (I think I would base my Jackson-Vanik case upon the technicality that the United States is not covered because it does not have a "non-market economy"—but the underlying rule of customary international law is not so qualified and could not be evaded by that consideration. Trying to argue that international human rights standards have declined since 1974 would clearly not pass the "straight face" test.)

I have not had time to research the issue, but my recollection is that in the recent past, Congress—or at least many members of Congress—have pressured the Executive to apply the Jackson-Vanik principle to trade with the People's Republic of China. Certainly many members continue to feel passionately about human rights issues, and to urge the President to identify and put pressure on other States who fail to comply with fundamental treaty norms in this important area. Unless someone can do a better job that I have in distinguishing an exit tax targeted at "rich Americans" from one aimed at "educated Jews," however, you may find as a practical matter that you will need to make a choice between enacting this provision and attempting in the years ahead to uphold the Jackson-Vanik Amendment and similar human rights norms. If this provision is enacted into law, I believe the odds are good that future US protests calling upon China, Iraq (which last month imposed an exit tax of its own to curtain the flow of capital), Iran, and other flagrant human rights violators to comply with the provisions of the Covenant on Civil and Political Rights will receive in reply a reference to American "violations" of Article 12.

Mr. Chairman, that concludes my prepared statement. I will be happy to attempt to answer any questions you or your colleagues might have.

FOOTNOTES

[1] Inter alia, this provision would amend the Internal Revenue Code by adding this language: If any United States citizen relinquishes his citizenship during a taxable year, all property held by such citizen at the time immediately before such relinquishment shall be treated as sold at such time for its fair market value and any gain or loss shall be taken into account for such taxable year.

That the "exit" is designed to affect a relatively small portion of the population is clear from the fact that the first $600,000 of gross income is excluded from this provision. According to the State Department 697 US citizens expatriated in 1993 and 858 the following year. "It is not yet known how many of these former citizens, if any, will be subjected to tax under section 877." Joint Committee on Taxation, Description of Revenue Provisions Contained in the President's Fiscal Year 1996 Budget Proposal 17 n.6 (Feb. 17, 1995). The fact that the Treasury Department anticipates more than $2 billion in additional revenues from this provision by FY 2000 suggests either that many expatriates will be covered or that the few covered will be hit with rather substantial additional tax bills under this provision. See infra, note 48.

[2] See, e.g., Eisner v. Macomber, 252 U.S. 189, 214–15 (1920).

[3] The Dialogues of Plato 217 (7 Britanica Great Books of the Western World, 1952). See also, Jeffrey Barist et al., Who May Leave, 15 Hofstral L. Rev. 381, 384 (1987).

[4] By coincidence, I discussed this issue in my prepared testimony before the Senate Judiciary Committee Subcommittee on the Constitution on 5 October 1994 (page 2–3 of original text), which has not yet, to my knowledge, been published.

[5] Id. at 4, and Barist et al., Who May Leave, 15 Hofstral L. Rev. at 384.

[6] Expatriation Act of 1868, 15 Stat. 223 (1868).

[7] 8 U.S.C. §1481, quoted in 87 Am. J. Int'l L. 601 (1993).

[8] Richards v. Secretary of State, 752 F.2d 1413 at 1422 (1985).

[9] Statute of the International Court of Justice, Art. 38. While customary law may over time replace a rule established by treaty, and the general goal is to ascertain the most recent expression of the consent of the parties (thus a more recent customary practice accepted as law (opinio juris) may prevail over a prior treaty), it is probably accurate to observe that, where a relevant treaty exists between the parties to a dispute, the terms of the treaty will provide at least the starting point for resolution of the dispute. However, the principle that "the specific prevails over the general" (lex specialis derogat generali) may well lead to a narrow customary practice prevailing over a more general treaty obligation.

[10] However, a UNGA resolution expressing legal principles approved by an overwhelming vote of Member States may serve as powerful evidence of the existence of a legally-binding international custom.

[11] 19 Dep't State Bull. 751 (1948).

[12] Report of the Senate Committee on Foreign Relations on the International Covenant on Civil and Political Rights, reprinted in 31 Int'l Leg. Mats. 645 (1992).

[13] A possible exception is the first Declaration specifying that the Covenant is Non-Self-Executing. Id. at 651.

[14] Report of the Senate Committee on Foreign Relations on the International Covenant on Civil and Political Rights, supra at 649 (p. 3 of OT).

[15] Preamble, 6 Int'l Leg. Mats. 368 (1967).

[16] Art. 12, id. at 372.

[17] The Movement of Persons Across Borders 76 (Louis B. Sohn & Thomas Buergenthal, eds.

[18] *Id.* at 79.

[19] *Id.* at 82.

[20] *Id.* at 81, quoting Article 6 of the 1989 Strasbourg Declaration on the Right to Leave and Return (prepared by a group of international experts under the auspices of the International Institute of Human Rights).

[21] International Covenant on Civil and Political Rights, Art. 12.

[22] Barist *et al., Who May Leave,* 15 Hofstra L. Rev. at 389.

[23] *Id.* at 389, 394.

[24] The International Bill of Rights: The Covenant on Civil and Political Rights 24 (Louis Henkin, ed. 1981), *quoted in* Barist *et al., Who May Leave,* 15 Hofstra L. Rev. at 395.

[25] Barist *et al., Who May Leave,* 15 Hofstra L. Rev. at 396.

[26] *Id.* at 406.

[27] 660 U.N.T. S. 194.

[28] 14 Intl'L Leg. Mats. 1292 (1975).

[29] To constitute binding international customary law, a rule must reflect "a general practice" that has been "accepted as law" (*opinio juris*). *See* Statute of the International Court of Justice, Art. 38 (1)(b).

[30] UNGA Res. 217 A (III), 3 UNGAOR 71, UN Doc. A/810 (10 Nov. 1948).

[31] Note to follow.

[32] Some rules of International Law are of such fundamental importance that they are considered "peremptory norms" *(jus cogens)* and bind all States irrespective of consent. A thorough discussion of this issue is precluded by the short time available to prepare this testimony. Some human rights principles have this status—it is doubtful that this is one of them. The issue is of only academic interest given the strong statement of the right to emigrate as constituting binding International Law contained in the Jackson-Vanik Amendment to the 1974 Trade Act (discussed below). Thus, the United States could hardly protest that it is not bound by this rule and claim to have protested against its creation.

[33] *Jus congens* rules (discussed *supra*) bind all States, and newly-formed States are bound by all rules of customary law in existence when they are created.

[34] In reality, a strong case can be made that the Soviet Union was bound by this provision of the *Declaration* in 1974. Among other things, abstention in the General Assembly does not constitute an adequate "protest" to protect against being bound (although it does not constitute "consent" either). The following year the issue was arguably resolved when Moscow signed the Helsinki Accords (which, as discussed *supra*, incorporated the text of the *Declaration.)* While the Helsinki Accords were not designed to be legally binding in themselves, Moscow's acceptance of the principles of the *Declaration* would undercut any Soviet claim that it objected to these principles as *customary* law.

[35] *See, e.g.,* Senate Report No. 93–1298 (Committee on Finance), *reprinted in* 4 U.S. Code Congressional & Admin. News 7338 (93d Cong., 2d Sess., 1974) (hereinafter cited as Finance Committee Report).

[36] This amendment, introduced by Representative Charles Vanik, was approved on the House floor on 11 December 1974 by a vote of 319–80. *See* 120 Cong. Rec. 39782 (1974).

[37] Finance Committee Report at 7213.

[38] *Id.* at 7338.

[39] 120 Cong. Rec. 39782 (1974).

[40] *Id.* 39806. The final vote was 88–0, with 12 Senators absent. All but two or three of the absent Senators were co-sponsors of the amendment.

[41] *Id.* at 39782.

[42] *Id.* at 39806

[43] 120 Cong. Rec. 39787.

[44] *Id.* at 39802.

[45] *Id.* at 39806.

[46] Trade Act of 1974, 19 U.S.C.A. §2432 (emphasis added).

[47] While I claim no special expertise on matters of finance or tax policy, I was impressed with Forbes magazine editor James W. Michaels' observation that ''It's not that legislators sympathize with rich tax dodgers. It's that they realize it's time to worry less about soaking the rich and more about changing the tax code to make the country more hospitable to the capital that produces jobs and economic growth.'' James W. Michaels, ''You can't take it (all) with you,'' Forbes, 13 March 1995, p. 10.

[48] The Treasury Department estimates that this provision will produce $2.2 billion in additional tax revenues between FY 1995 and FY 2000. Department of the Treasury, General Explanations of the Administration's Revenue Proposals 17 (Feb. 1995).

[49] Sir Walter Scott, The Lay of the Last Minstrel, canto VI, st. 1.

[50] As will be discussed, treaties are a part of the ''supreme law of the land'' and customary international law ''is part of our law'' too. The monist school views international law to be superior to municipal law in a single legal system.

[51] See, e.g., Whitney v. Robertson, 124 U.S. 190 (1888).

[52] US Const. Art. VII

[53] Id. Art. I, Sec. 7.

[54] Id. Art. II, Sec. 2.

[55] See, e.g., Louis Henkin, The Constitution and United States Sovereignty, 100 HARV. L. REV. 853 (1987).

[56] Note to follow.

[57] For a discussion by Chief Justice Marshall of the distinction between self-executing and non-self-executing treaties, see Foster and Elam v. Neilson, 27 U.S. (2 Pet.) 253 (1829).

[58] Note to follow.

[59] This sometimes occurs inadvertently when legislation is considered by members who are simply unaware of a conflicting treaty provision (as may be the case in this Committee's approval of the statute being considered in this hearing), but it also occurs occasionally even after the conflict with a treaty has been identified. An example of this that comes readily to mind was S-961, the ''Magnuson Fisheries and Conservation Act,'' passed around 1976. See the minority views of my former employer, Senator Robert P. Griffin, included in the Foreign Relations Committee's report on this bill for a discussion of this problem.

[60] These may range from judicial settlement to reciprocal breach or simply the ''horizontal enforcement'' of retorsionary behavior to pressure our Country to observe its solemn international legal obligations (pacta sunt servanda).

[61] The Department of State, for example, has warned that ''Persons considering renunciation [of US citizenship] should also be aware that the fact that they have renounced U.S. nationality may have no effect whatsoever on their U.S. tax or military service obligations.'' 87 AM. J. INT'L L. 602 (1993).

PREPARED STATEMENT OF JAMISON S. BOREK

Thank you Mr. Chairman and Members of the Committee. I am here today to address the question whether section 5 of H.R. 831 as reported by the Senate Committee on Finance raises legal questions concerning international human rights.

The proposal in section 5 would effectively require payment of taxes by U.S. citizens on gains, if they have such gains, if they elect to renounce U.S. citizenship, by treating this as equivalent to a realization of gains (or losses) by sale. The proposal would only apply to gains in excess of $600,000; it would not apply to U.S. real property owned directly, nor to certain pension plans.

It has been suggested by some that this proposal would violate the right to leave the territory of a state (including one's country of nationality) or the right to change one's citizenship as recognized in international human rights law. In our view, however, this tax proposal does not conflict with these or any other international human rights.

Section 5 is not an ''exit tax''. It does not apply to the act of emigration and is wholly unrelated to travel. Rather, it applies at the time an individual renounces U.S. citizenship. Based on past experience, the proposal is most likely to affect U.S. citizens who have already departed from the United States. It is well established, nonetheless, that a state could impose economic controls in connection with departure as long as such controls do not result in a *de facto* denial of an individual's right to emigrate.

Similarly, a claim of violation of the right to renounce citizenship could only be made where that right is effectively denied. There is no international law right to avoid taxes by changing citizenship. Section 5 would impose taxes comparable to those which U.S. citizens would have to pay were they in the United States. It is a bona fide means of collecting taxes on gains which have already accrued. It is not a pretext to keep people from leaving, and it is not so burdensome as effectively to preclude change of nationality or emigration. It applies only to gains, and only when these gains are in excess of $600,000.

In short, it is the view of the Department of State that this proposal does not raise any significant question of interference with international human rights.

I hope that this information is helpful to the Committee.

UNIVERSITY OF VIRGINIA,
Charlottesville, VA; March 20, 1995.

LESLIE B. SAMUELS,
Assistant Secretary of the Treasury for Tax Policy, U.S. Department of the Treasury.

DEAR MR. SAMUELS: I have been asked to offer an opinion as to whether the Administration's proposal to treat the renunciation of U.S. citizenship as a realization event with respect to wealthy taxpayers presents any problems under international law, particularly in light of the position the United States has taken in the past with respect to the freedom to emigrate. As I find myself in the unusual position of being a specialist in international law, U.S.-Soviet relations, and federal taxation, I am happy to do so.

The Jackson-Vanik Amendment to the Trade Act of 1974 and the 1975 Helsinki Accords both express a strong U.S. stand in favor of the freedom of people of emigrate free of more than ''a nominal tax,'' 19 U.S.C. §2432(a)(2), and there is substantial authority for the proposition that the international law of human rights incorporates the obligation to refrain from erecting such impediments to emigration. But it is critical to recognize the distinction between the right to travel, on the one hand, and the right to change one's citizenship status, on the other. Emigration necessarily involves the former, but not necessarily the latter. The human rights concerns that dominated our encounters with the Soviet Union and other totalitarian regimes during the 1970s and 1980s were based on violations of the right to travel. Those governments treated their borders as the perimeter of a prison and their citizens as prisoners. The so-called education tax that the Soviet Union threatened to impose on emigrants, which inspired the above cited language in the Jackson-Vanik Amendment, was triggered by a request to travel abroad, not by an attempt to renounce Soviet citizenship. Whether the communist regimes also made it difficult to surrender citizenship was a matter of indifference to us. Indeed, many authorities believed that the Soviet Union and other governments violated international law by making it too easy to lose one's citizenship, as they did when they imposed involuntary loss of citizenship as a form of punishment for political dissent (*e.g.*, the case of Aleksandr Solzhenitsyn).

The Administration's proposal, as I understand it, has absolutely no effect on the right of a citizen to travel abroad. It is triggered only by a change of citizenship status, not by the crossing of the country's borders. The reason for this distinction is clear when one considers how U.S. tax rules operate. Whether a citizen resides within or without the United States, the obligation to pay tax on appreciation of assets remains the same. Any gain realized and recognized during life will result in an income tax. Any unrealized appreciation that remains at death will not be subject to an income tax, but instead will subject the decedent to the estate tax. To be sure, the federal estate tax is not an exact substitute for an income tax at death on unrealized appreciation, both because only wealthy persons (those with assets in excess of $600,000, assuming no taxable gifts during life) are subject to the estate tax, and because the taxable estate includes both realized and unrealized appreciation. But I am not alone in having pointed out that the estate and gift tax, in practice, serve as a reasonable approximation for the income tax that could be levied on unrealized appreciation at death.

All of the above turns on citizenship, not on residence. A U.S. citizen who resides abroad will have to include in his tax base any gain realized from the disposition of an asset, see Cook v. Tait, 265 U.S. 47 (1924), will pay a federal gift tax on any taxable gift during his life, no matter where the asset is located, and will include all of his worldwide assets in his taxable estate at death. By contrast, a citizen who severs the bond of citizenship and does not continue to reside in the United States will pay neither income, gift, nor estate tax (except as U.S.-sourced income and, for the estate and gift tax, transfers of certain property sourced to the United States). The change of citizenship status, not of residence, is what matters for U.S. tax law. Current law recognizes the significance of change sin citizenship by subjecting nonresident aliens who lose U.S. citizenship for tax avoidance reasons to a special alternative income tax, see Internal Revenue Code Section 877. Section 2107 imposes a similar result with respect to the estate tax, and 2501(a)(3) with respect to the gift tax. What the Administration proposal would do, as I understand it, is replace the unworkable tax avoidance standard of Sections 877, 2107 and 2501(a)(3) with a per se rule that applies to any person with sufficient assets to make future estate taxation a probability. An analogous provision is Section 367 of the Code, which denies nonrecognition treatment in certain corporate reorganizations if the recipient of appreciated property is a foreign corporation. I never have heard the argument that the latter provision imposes an impermissible burden on the right of a domestic corporation to export its capital.

In summary, the international law of human rights is concerned with restrictions on the right to leave one's country, not those on the right to renounce one's citizenship. To the extent human rights law deals with citizenship status, it addresses involuntary denials of citizenship, not burdens triggered by the renunciation of citizenship. Furthermore, the proposed measure is not a tax on the export of capital as such, but rather a logical part of a comprehensive scheme to ensure that all appreciation of capital owned by a U.S. citizen eventually will be subject to a U.S. tax, whether income, gift, or estate. For these reasons, it is inconceivable to me that the Administration's proposal could be seen as violating international human rights law.

To be sure, there are few positions with respect to customary international law that cannot obtain the support of at least some jurists. Last Saturday, while passing through Pittsburgh's airport, I ran into my former student, Bob Turner, who informed me of his intention to testify before the Senate Finance Committee to the effect that the proposal did raise problems under international law. As I told him at the time, I found his arguments unconvincing. However, I am responsible only for Bob's education in Soviet law, not in international or tax law.

I hope this letter is useful. Please feel free to make whatever use of it you wish.

Sincerely,

PAUL B. STEPHAN III.

ONE INTERNATIONAL PLACE,
BOSTON, MA, *March 20, 1995*.

Hon. BOB PACKWOOD,
Chairman, Committee on Finance,
U.S. Senate,
Washington, DC.

Hon. DANIEL P. MOYNIHAN,
U.S. Senate,
Washington, DC.

DEAR CHAIRMAN PACKWOOD AND SENATOR MOYNIHAN: I would like to comment on the provisions of Section 5 of H.R. 831 as reported by the Committee on Finance (the "Committee Bill").

I am a partner in the law firm Ropes & Gray in Boston, where I practice international tax law on behalf of U.S. and non-U.S. corporate and individual clients. Prior to joining Ropes & Gray, I served as International Tax Counsel to the U.S. Treasury Department. Altogether, I served in the Treasury Department for five years during the Reagan Administration.

Although I am Vice Chairman of the American Bar Association Section of Taxation's Committee on Foreign Activities of U.S. Taxpayers and an active member of several other bar and professional associations, my comments are not made as a representative of Ropes & Gray or any of its clients, the American Bar Association Tax Section or any of the other bar or professional associations of which I am a member. My comments are directed exclusively to tax policy aspects of the proposal in the Committee Bill to amend the Internal Revenue Code of 1986, as amended, by adding proposed Section 877A.[1] Subject to certain technical comments referred to below, I strongly support enactment of proposed Section 877A.

DESCRIPTION OF CURRENT LAW

The United States exercises personal jurisdiction to tax individuals by taxing the worldwide income of U.S. citizens (whether or not resident or domiciled in the United States) and residents.[2] A U.S. taxpayer may elect to credit foreign income taxes against his U.S. tax, subject to a limitation that applies with respect to categories of foreign source income to restrict the credit to the amount of U.S. tax paid with respect to income in that category.

The United States asserts a source-based tax on nonresident aliens.[3] Nonresident aliens are taxed on the gross amount of U.S.-source interest, dividends, rents, and other fixed or determinable income at a flat rate of 30 percent (or a lower treaty rate). This tax generally is collected by withholding. A nonresident alien is taxed at regular graduated rates on income that is effectively connected with a U.S. trade or business, less deductions that are properly allocable to the effectively connected income. A nonresident alien individual is allowed a foreign tax credit under Section 906 only for foreign taxes paid with respect to income effectively connected with a U.S. trade or business.

Under current law, the only income tax provision governing a change from citizenship to non-citizenship status is Section 877, first enacted in 1966. Under Section 877, a U.S. citizen who relinquishes his U.S. citizenship with a principal purpose to avoid Federal income tax is taxed either as a nonresident alien or under an alternative taxing method, whichever yields the greater tax, for 10 years after expatriation. For purposes of determining the tax under the alternative method, gains on the sale of property located in the United States and stocks and securities issued by U.S. persons are treated as U.S.-source income, taxable at rates applicable to U.S. citizens.[4]

Whether tax avoidance is a principal purpose for the expatriation is determined by all of the relevant facts and circumstances. If the I.R.S. establishes that it is reasonable to believe that the loss of U.S. citizenship would result in a substantial reduction in the taxpayer's income taxes for the year (taking account of U.S. and foreign taxes), the burden of proving that the loss of citizenship did not have tax avoidance as one of its principal purposes is on the taxpayer. This presumption is rebuttable.[5]

A foreign tax credit is not allowed for foreign taxes on income that is deemed to be U.S.-source income under the alternative method. The effect of the source rules generally is to transform foreign income that would not be effectively connected income into U.S. gross income. Because Section 877(c) does not cause the income to be effectively connected income, the Section 906 foreign tax credit will not apply. Any foreign taxes imposed on the income re-sourced under Section 877(c) therefore would give rise to double taxation.

The so-called savings clause found in most modern income tax treaties generally provides that the United States may tax its citizens and residents as though the treaty had not come into effect.[6] Although the I.R.S. has published a revenue ruling taking the position that the savings clause preserved U.S. taxation of former citizens taxable under Section 877,[7] the Tax Court held in *Crow* v. *Commissioner*, 85 T.C. 376 (1985), that the savings clause of the 1942 United States-Canada Income Tax Convention did not apply to a former citizen who, it was assumed for purposes of deciding petitioner's motion for summary judgment, expatriated to Canada for a principal purpose of avoiding United States tax. The Court found that, properly interpreted, the Convention prohibited the United States from taxing the taxpayer's capital gain from the sale of stock under Section 877. Based on the *Crow* decision, it is doubtful whether the United States may tax a treaty resident under Section 877 on income that a treaty reserves for taxation by the country of residence unless the treaty specifically preserves the U.S. right to tax a Section 877 expatriate.

Current U.S. treaty policy is to cover Section 877 expatriates under the savings clause to permit the United States to tax income or gains of a Section 877 expatriate who is resident in the treaty partner country notwithstanding other articles of the treaty.[8] Even where the savings clause covers taxation of an expatriate under Section 877, the coverage may be less than complete.[9]

It does not appear that treaties remedy the failure of the domestic law foreign tax credit mechanism to avoid double taxation under Section 877. For example, the 1980 Convention between the United States and Canada allows the United States to impose tax on gains from the sale of stock in a U.S. company realized by a Section 877 expatriate who is resident in Canada.[10] Canada also would be allowed to tax the gains.[11] For purposes of applying the foreign tax credit provisions of the Convention, the gains from the sale of stock would be treated as Canadian-source income,[12] however, the United States does not commit to allow a credit for the Canadian tax.[13]

DEFICIENCIES OF CURRENT LAW

The reason for enactment of Section 877 in 1966 was that the elimination of graduated rates with respect to non-effectively connected income of a nonresident alien could encourage some individuals to surrender their U.S. citizenship and move abroad. The 89th Congress did not have any experience as to whether the other changes in taxation of nonresident aliens made by the Foreign Investors Tax Act of 1966 would induce expatriations and chose to employ a tax avoidance purpose condition to the application of Section 877.

The facts of the Furstenberg case, in which the Tax Court found that the taxpayer's expatriation did not have tax avoidance as a principal purpose, illustrate why a tax avoidance purpose standard is ill-advised. To satisfy a commitment made before her marriage to her new husband, Mrs. Furstenberg renounced her U.S. citizenship immediately after her honeymoon on December 23, 1975. As a result of the Tax Court's decision that Section 877 did not apply, it appears that Mrs. Furstenberg paid no U.S. tax on as much as $9.8 million of capital gains from selling securities owned at the time of her expatriation in the two years following her expatriation.

There is ample precedent for a U.S. claim to tax appreciated assets at a time when the asset will no longer be subject to U.S. personal taxing jurisdiction. Under sections 367 and 1491, the United States overrides otherwise applicable nonrecognition rules in order to tax transfers of appreciated assets to foreign entities. It is accepted that this principle should apply in circumstances where there is no actual transfer of an asset, for example, upon the termination of an election by a foreign corporation to be treated as a domestic corporation under section 1504(d) or when a foreign trust ceases to be a grantor trust with a U.S. grantor. Amendments in 1984 to sections 367 and 1492 deleted exceptions to taxation of such outbound transfers where the taxpayer could establish that the transfer did not have as one of its principal purposes the avoidance of Federal income taxes. The principal purpose test similarly should be deleted from Section 877.[14]

A second difficulty with current Section 877 relates to the assertion of U.S. taxing jurisdiction after the taxpayer has renounced U.S. citizenship. At that point, the taxpayer may be resident in another taxing jurisdiction that may rightfully feel that it has the primary right to tax gains of a resident from the sale of tangible property (other than real estate in another country) and intangible property. It is not surprising that there may be disagreement as to which country should be considered to have the primary right to tax. A tax imposed at the time of expatriation, however, would accurately delineate gains properly subject to U.S. taxing jurisdiction. This would improve the position of the United States if it asks treaty partners to increase a taxpayer's basis in property taxed by the United States on expatriation for purposes of taxation by the treaty partner. If taxation at the time of expatiation is adopted, I would urge the Treasury to take such a position in treaty negotiations.

A third problem with current Section 877 is that it is easily avoided. I quote from a 1993 article published in Tax Notes International:

"Even for those nonresident former U.S. citizens with substantial U.S. assets and income, there are techniques that can greatly reduce the impact of the anti-abuse rules by

[1] Footnotes at end of letter.

converting U.S. income and assets into foreign income and assets or by deferring income and taxable transfers until after the 10-year period under the anti-abuse rules has expired.

For example, consider the plight of a tax-motivated former U.S. citizen living abroad and owning a portfolio of U.S. stocks and bonds. Without taking any measures, such a person would be subject to U.S. income tax on interest, dividends and capital gain from the portfolio and would be subject to a U.S. estate and gift tax on taxable transfer of assets in the portfolio. Such an individual could, however, transfer the portfolio to a foreign corporation that is not engaged in a U.S. trade or business with drastically more favorable results.

For income tax purposes, the foreign corporation would itself be taxed in the same manner as an NRA who had never been a U.S. citizen (i.e., gross U.S.-source dividends would be subject to a flat 30-percent-or-lower withholding tax, certain types of U.S.-source interest would be subject to a similar flat withholding tax while other types of U.S.-source interest would be exempt under the portfolio interest or other exemptions and capital gains would be exempt from tax unless real estate related).

While a sale of stock in the foreign corporation by the former U.S. citizen would be treated as taxable U.S.-source income under the anti-abuse rule, as sale of the U.S. stocks and securities in the portfolio by the foreign corporation would not. Moreover, dividends by the foreign corporation to its shareholders would be foreign-source, and therefore free from U.S. tax, even if the foreign corporation's earnings out of which it pays the dividends are U.S.-source interest, dividends, and capital gains.'' (Footnotes omitted.)[15]

In light of the increasing sophistication of taxpayers, it is not surprising that the easy pickings of tax-motivated expatriation are too tempting for some to resist. Based on informal discussions with the State Department, and Staff of the Joint Committee on Taxation has reported that 697 citizens expatriated in 1993 and 858 in 1994.[16] There is evidence that some of these expatriations will result in substantial revenue loss as a result of the infirmities of current Section 877. It is time to amend the law to address current realities.

DESCRIPTION OF PROPOSED SECTION 877A

Under the Committee Bill, a U.S. citizen who relinquishes U.S. citizenship generally would be treated as having sold all of his or her property at fair market value immediately prior to relinquishing citizenship and gain or loss from the deemed sale would be subject to U.S. income tax. In addition, the deferral of tax or income recognition (e.g., due to the installment method) would terminate on the date of the deemed sale and the deferred tax would be due and payable on that date.

Generally property interests that would be included in the individual's gross estate under the Federal estate tax if such individual were to die on the day of the deemed sale, plus certain trust interests that are not otherwise included in the gross estate, would be taxed on the expatriation date. The first $600,000 of net gain recognized on the deemed sale would be exempt from tax. If a taxpayer were determined to hold an interest in a trust for purposes of Section 877A, the trust would be treated as though it sold the taxpayer's share of assets of the trust and the proceeds were distributed to the taxpayer and recontributed to the trust.

U.S. real property interests, which remain subject to U.S. taxing jurisdiction in the hands of nonresident aliens, generally would be excepted from the proposal.[17] Certain interests in qualified retirement plans and, subject to a limit of $500,000, interests in foreign pension plans (as provided in regulations) also would be excepted from the deemed sale rule.

A U.S. citizen would be treated as having relinquished his citizenship on the earlier of (i) the date he renounces citizenship before a diplomatic or consular officer, (ii) the date he provides to the State department a signed statement of voluntary relinquishment of citizenship confirming an act of expatriation under the Immigration and Nationality Act, (iii) the date that the U.S. Department of State issues a certificate of loss of nationality, or (iv) the date a court cancels a naturalized citizen's certificate of naturalization. The tax would be due on the 90th day after the expatriation date. The Internal Revenue Service would be authorized to allow a taxpayer to defer payment of the tax for up to 10 years under section 6161 as through the tax were an estate tax imposed by chapter 11.

The Committee Bill's Section 877A would be effective for U.S. citizens who relinquish their U.S. citizenship on or after February 6, 1995. No tax would be due before 90 days after enactment.

ANALYSIS OF PROPOSED SECTION 877A

The Committee Bill meets the three objections to current law Section 877 described above. It deletes the tax avoidance purpose test. It imposes tax on gain determined as of the date a taxpayer relinquishes citizenship and thereby properly measures the gain subject to U.S. personal taxing jurisdiction. As a consequence of these changes it will be more administrable and not subject to easy avoidance.

The Committee Bill also reflects several significant improvements over the text released in the original version of H.R. 981. The definition of when a taxpayer relinquishes citizenship has been modified to relate to the earliest of several substantive acts that manifest an intent to voluntarily relinquish citizenship. This should adequately protect taxpayers who have relied on current law. The I.R.S. authority to extend the time to make payment of the tax is expanded to permit deferral of up to 10 years under rules that are commonly used in the estate tax context. These changes are welcome.

I suggest another modification to the Committee Bill. I recommend that an alien that becomes a naturalized citizen take a ''fresh start'' fair market basis in his or her assets for purposes of Section 877A. The measuring date for this purpose should be the earliest of (i) the date the alien becomes a naturalized citizen, (ii) the date the alien becomes a resident alien, and (iii) the date the asset is ''effectively connected'' with a U.S. trade or business of the alien. This measure is important to support the position that the U.S. claim to tax is truly related to its personal or source taxing jurisdiction.

I reserve comment on certain technical aspects of the proposal and would be pleased to work with the Committee staff on the details of final legislation. In particular, I do not comment, without further study, on the approach taken by the Committee Bill to interests in trusts or to the interaction of Section 877A with estate and gift tax rules.

Finally, I respectfully disagree with certain initial criticisms of H.R. 981 in comments prepared by other individual members of the American Bar Association.

The weight of scholarship rejects the view that realization is or should be constitutionally required to tax gains. Since, in my experience, Congress, and this Committee, exercises an appropriate skepticism regarding professorial musings, perhaps the more relevant precedent is that Congress has enacted at least two provisions that tax gains before they are realized. Section 1256 was added to the Code in 1981 and provides that certain regulated futures and foreign currency contracts are marked-to-market on the last day of a taxpayer's taxable year and gain or loss recognized.[18] Section 475, enacted in 1993, requires securities dealers to mark-to-market securities held in inventory on the last day of the taxable year and recognize gain or loss. Moreover, fairness to taxpayers as well as the Government's revenue interests may require that such mark-to-market treatment be expanded to a broader range of circumstances. It would be extremely unwise for this Committee to adopt the holding of Eisner v. Macomber[19] in a way that could be viewed as imposing a constitutionally-based realization requirement.

I also would not in any way equate the imposition by the United States, in 1995, of a tax on its fair share of the appreciation in assets owned by U.S. persons during their period of U.S. citizenship to an exit tax imposed on Jewish and politically motivated emigrants from the Union of Soviet Socialist Republics during the State-sponsored repression of the Brezhnev era. A tax that excludes the first $600,000 of gain can hardly be viewed as a barrier to emigration.

CONCLUSION

The Committee's proposed Section 877A is an improvement over current law, is sound international tax policy and deserves the strong support of your Committee.

Please do not hesitate to contact me if I may be of assistance to the Committee.

Sincerely,

STEPHEN E. SHAY.

FOOTNOTES

[1] Unless otherwise indicated, all section references are to the Internal Revenue Code of 1986, as amended and as proposed to be amended by the Committee Bill.

[2] Taxation on the basis of citizenship is different from the practice of most countries, which is to tax individuals on the basis of residence. The Supreme Court, however, has upheld the constitutionality of taxing a nonresident citizen. Cook v. Tait, 265 U.S. 47 (1924).

[3] A nonresident alien individual is an individual who is neither a U.S. citizen nor a resident alien. Generally, an alien individual is a resident alien for U.S. tax purposes under Section 7701(b) if he or she (1) is a lawful permanent resident of the United States (i.e. holds a green card), or (2) satisfies the ''substantial presence'' test as a result of being physically present in the United States for a prescribed amount of time.

[4] These same taxing rules also are applied under Section 7701(b)(10) in the case of a resident alien individual who is resident in the United States for three consecutive years, then ceases to be a resident, and subsequently becomes a resident within three years after the close of the initial residency period. This anti-abuse rule protects the U.S. tax base from erosion by a resident alien who transfer residence from the United States for a limited period of time in order to sell a highly appreciated asset and then resumes his or her U.S. residence.

[5] See, e.g., Furstenbert v. Commissioner, 83 T.C. 755 (1985).

[6] See U.S. Department of the Treasury, Proposed Model Convention Between the United States and _______ for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion, Art. 1(3) (1981), reprinted in 1 Tax Treaties (CCH) ¶208 (1994) (hereinafter ''U.S. Model Treaty''). An important exception to the saving clause is the obligation of a contracting state to give double tax relief for taxes imposed by the source country.

The savings clause implements the U.S. policy that tax treaties generally are not intended to affect U.S. taxation of U.S. citizens or residents. American Law Institute, Federal Income Tax Project: International Aspects of United States Income Taxation (Proposals of the American Law Institute on United States Income Tax Treaties); 229, N. 606 (1992).

[7] Rev. Rul. 79–152, 1979–1 C.B. 237 (holding that a liquidating distribution would be taxable to a Section 877 expatriate that acquired residence in a treaty country even though the treaty did not preserve U.S. right to tax under Section 877).

[8] See U.S. Department of the Treasury, Proposed Model Convention Between the United States and _______ for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion, Art. 1(3) (1981), reprinted in 1 Tax Treaties (CCH) ¶208 (1994).

[9] The 1993 U.S. treaty with the Netherlands, for example, does not cover Section 877 expatriates who are Dutch nationals. Convention Between the United States of America and The Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income, Art. 24(1).

[10] Convention Between the United States of America and Canada With Respect to Taxes on Income and on Capital (''U.S.-Canada Treaty''), Art XXIX(2).

[11] U.S. Canada Treaty, Art. XIII(4).

[12] U.S.-Canada Treaty, Art. XXIV(3)(b).

[13] See U.S.-Canada Treaty, Art. XXIV(1).

[14] There are a series of exceptions to taxation at the time of transfer under sections 367 and 1491 that are based in substantial part on the fact that the transferring shareholder remains subject to residence-based taxation on property that receives a carryover basis in the exchange for the transferred property. That circumstance is not present in the context of Section 877.

[15] Zimble, ''Expatriate Games: The U.S. Taxation of Former Citizens,'' Tax Notes Int'l (Nov. 2, 1993), LEXIS 93 TNI 211–15.

[16] Staff of the Joint Committee on Taxation, ''Description of Revenue Provisions Contained in the President's Fiscal Year 1996 Budget Proposal,'' Footnote 6 (JCS–5–95, Feb. 15, 1995).

[17] The exception would apply to all U.S. real property interests, as defined in section 897(c)(1), except stock of a U.S. real property holding corporation that does not satisfy the requirements of section 897(c)(2) on the date of the deemed sale.

[18] The Ninth Circuit has passed favorably on the constitutionality of Section 1256, *Murphy* v. *United States*, 992 F. 2d 929 (9th Cir. 1993).

[19] 252 U.S. 189 (1920).

EXHIBIT 2

HARVARD LAW SCHOOL,
Cambridge, MA, March 24, 1995.

Hon. LESLIE B. SAMUELS,
Assistant Secretary (Tax Policy), Department of the Treasury, Washington, DC.

DEAR SECRETARY SAMUELS: Your office has requested my views as to international law implications of the proposed tax on expatriates that would be imposed by section 5 of H.R. 831. You will understand that this is my personal opinion and in no way purports to represent the views of the institution to which I belong. It is also compact in form due to the constraints of time imposed by your legislative schedule and my own impending travel.

The right of expatriation has always been highly valued by the United States, which has defended it against the claims of other nations that refused to let their citizens go. The right to make this choice is the counterpart of the right not to lose one's citizenship except by one's own voluntary choice, a right underlined by opinions of the Supreme Court. However, in my view, the proposed tax does not amount to such a burden upon the right of expatriation as to constitute a violation of either international law or American constitutional law. It merely equalizes over the long run certain tax burdens as between those who remain subject to U.S. tax when they realize upon certain gains and those who abandon their citizen while the property remains unsold.

Furthermore, the proposed tax does not except, in the most indirect way, burden the right to emigrate. It is the right to emigrate rather than the right to expatriate oneself which is the subject of various conventions and of customary international law. As stated in the preceding paragraph, it basically equalizes certain tax burdens. It is not comparable to the measures imposed by such countries as the former Soviet Union and German Democratic Republic which were obviously and intentionally burdens on the right to emigrate.

In arriving at these conclusions I have reviewed various materials such as your statement before the Subcommittee on Taxation and Internal Revenue Oversight, two opinions of the Office of the Legal Adviser, U.S. State Department, the views of Professors Paul Stephan III and Robert Turner and others.

Very truly yours,
DETLEV F. VAGTS,
Bemis Professor of Law.

NEW YORK UNIVERSITY,
SCHOOL OF LAW,
New York, NY, March 27, 1995.

Hon. LESLIE B. SAMUELS,
Assistant Secretary (Tax Policy), Department of the Treasury, Washington, DC.

DEAR MR. SECRETARY: You have asked for my views on section 5 of H.R. 831 presently pending before the U.S. Senate, which as I understand it would impose a capital gains tax on United States citizens who renounce their U.S. citizenship, based on a hypothetical sale of all their property (subject to a deduction) immediately prior to renunciation. In particular, you have asked my view on whether such a tax would be inconsistent with applicable treaties or principles of international law.

STATEMENT OF QUALIFICATIONS

I have been a professor of law at New York University since 1967, specializing in international law and international economic transactions. Prior to joining the faculty of New York University, I served for more than five years in the United States Department of State, as Special Assistant to the Legal Adviser for Economic Affairs, and Deputy Legal Adviser (1961–66). I was an Associate Reporter for the American Law Institute's Restatement (Third) of the Foreign Relations Law of the United States (1979–87), and I served as consultant to the ALI Project on Income Tax Treaties (1988–92).

CONCLUSION

Without taking any position on the desirability of the proposed legislation, I am confident that neither adoption nor enforcement of the provision in question would violate any obligation of the United States or any applicable principles or international law.

ANALYSIS

There is no doubt that international law today recognizes the right to emigrate, and the right to change one's nationality. Article 13(2) of the universal Declaration of Human Rights (1948) states.

Everyone has the right to leave any country, including his own. . .

Article 15(2) states: No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Without here debating the binding character of the Universal Declaration (see ''Restatement (Third) of Foreign Relations Law,'' introduction to Part VII, §701, and notes thereto), it is clear to me that the Congress should not be asked to adopt legislation that runs contrary to principles to which the United States has given and continues to give its support. I do not believe, however, that H.R. 831 is contrary either to the right to emigrate (i.e., change of one's residence) or to expatriate (i.e., change of one's nationality). No prohibition against performing either or both of these acts is contained in the proposed legislation, nor is the tax so burdensome as to be fairly regarded as penal or confiscatory.

Persons who wished to abandon their American Citizenship for reasons of political or religious belief would not be prevented from doing so by H.R. 831. Persons who were considering renunciation of their U.S. citizenship for purposes of reducing their tax liability—whether on income or upon succession at death—might be dissuaded by H.R. 831 from doing so, but I do not believe the effect of the proposed tax could be classified as an arbitrary denial of the right to change one's nationality within the meaning of the Universal Declaration.

I understand that the question has been raised whether H.R. 831 is inconsistent with §402 of the Trade Act of 1974, the so-called Jackson-Vanik Amendment. I am very familiar with the amendment, having written about it in my book ''Trade Controls for Political Ends'' at pp. 166–190 (2d.ed 1983). I am clear that the amendment was addressed to a quite different purpose, i.e., inducement to Soviet authorities to abandon their restrictions on Jews and some other groups who desired to leave the Soviet Union to escape discrimination and persecution. It is true that one of the restrictions against which the Jackson-Vanik Amendment was directed was taxation; however (i) the Soviet tax was a relatively high tax based not on wealth or income but on the level of education; and (ii) the tax was imposed on emigration, not on change of citizenship or nationality. I have read the prepared statement of Professor Robert F. Turner of March 21, 1995; I find his suggestion that H.R. 831 is somehow inconsistent with the ideals expressed in the Jackson-Vanik Amendment quite unpersuasive, as a matter of history, of purpose, and of law.

On sum, imposition of unreasonable conditions on emigration or change of nationality could be contrary to international law. H.R. 831 imposes no restrictions on emigration; it does impose some conditions on renunciation of United States citizenship, but these conditions are not unreasonable, and therefore not unlawful.

Respectfully submitted,
ANDREAS F. LOWENFELD,
Herbert and Rose Rubin Professor of International Law.

TUFTS UNIVERSITY
THE FLETCHER SCHOOL OF LAW AND DIPLOMACY,
Medford, MA, March 24, 1995.

Hon. DANIEL PATRICK MOYNIHAN,
U.S. Senate.

Re: Tax Compliance Act of 1995, H.R. 981

DEAR SENATOR MOYNIHAN: I am writing to express my serious concern over the proposed ''exit tax'' included in Sec. 201 of H.R. 981. This concern is based not on an evaluation of its tax consequences, an area in which I am not an expert, but rather on the possible inconsistency of the tax with fundamental international human rights norms and U.S. international legal obligations.

As you know, the U.S. is now a party to the Covenant on Civil and Political Rights, article 12 of which guarantees the right of everyone ''to leave any country, including his own.'' By coincidence, the United States will present its first report on compliance with the Covenant to the Human Rights Committee in New York next week.

Although I understand that the ''exit tax'' is based on renunciation of citizenship rather than on leaving the country, it is difficult to see how one can ''punish'' the former without seriously compromising the latter. Indeed, the imposition of confiscatory taxes has been a policy pursued by many countries to discourage emigration, whether on purported national security grounds, specious economic arguments, or to prevent ''brain drain;'' I address these and other issues in my 1987 book, ''The Right to Leave and Return in International Law and Practice'' (Martinus Nijhoff).

In 1986, a meeting of eminent American and European legal experts adopted the ''Strasbourg Declaration on the Right to Leave and Return,'' a copy of which I attach for your information. I would particularly draw your attention to article 5, which states, inter alia, that "[a]ny person leaving a country shall be entitled to take out of that country . . . his or her personal property . . . [and] all other property or the proceeds thereof, subject only to the satisfaction of legal monetary obligations, such as maintenance obligations to family members, and to general controls imposed by law to safeguard the national economy, provided that such controls do not have the effect of denying the exercise of the right." The tax in question would not appear to meet these standards.

Without having examined the provisions of Sec. 201 in greater detail, I cannot state definitively that it would violate international law. However, the human rights implications of such a provision appear to be extremely serious, and adoption of the law would seem, at best, to be hypocritical, given the legitimate and consistent U.S. insistence on free emigration from other countries over the years.

I hope that the Senate will examine these issues with great deliberation before it decides to balance the budget on the back of individual rights.

Yours sincerely,

HURST HANNUM,
Associate Professor of International Law.

APPENDIX F

STRASBOURG DECLARATION ON THE RIGHT TO LEAVE AND RETURN

Adopted on 26 November 1986

PREAMBLE

The Meeting of Experts on the Right to Leave and Return,

Recognising that respect for human rights and fundamental freedoms is essential for peace, justice and well-being and is necessary to ensure the development of friendly relations and co-operation among all states;

Recalling that the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination, as well as regional conventions, recognize the fundamental principle, based on general international law, that everyone has the right to leave any country, including one's own, and to return to one's own country;

Emphasizing that the right of everyone to leave any country and to enter one's own country is indispensable for the full enjoyment of all civil, political, economic, social and cultural rights;

Concerned that the denial of this right is the cause of widespread human suffering, a source of international tensions, and an object of international concern;

Adopts the following Declaration:

Article 1

Everyone has the right to leave any country, including one's own, temporarily or permanently, and to enter one's own country, without distinction as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, marriage, age (except for unemancipated minors independently of their parents), or other status.

Article 2

Every state shall adopt such legislative or other measures as may be necessary to ensure the full and effective enjoyment of the rights set forth in this Declaration.

All laws, administrative regulations or other provisions affecting the enjoyment of these rights shall be published and made easily accessible.

THE RIGHT TO LEAVE

Article 3

(a) No person shall be subjected to any sanction, penalty, reprisal or harassment for seeking to exercise or for exercising the right to leave a country, such as acts which adversely affect, inter alia, employment, housing, residence status or social, economic or educational benefits.

(b) No person shall be required to renounce his or her nationality in order to leave a country, nor shall a person be deprived of nationality for seeking to exercise or for exercising the right to leave a country.

(c) No person shall be denied the right to leave a country on the grounds that that person wishes to renounce or has renounced his or her nationality.

Article 4

(a) No restriction may be imposed on the right to leave except those which are

(1) provided by law;

(2) necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others; and

(3) consistent with internationally recognized human rights and other international legal obligations.

Any such restriction shall be narrowly construed.

(b) Any restriction on the right to leave shall be clear, specific and not subject to arbitrary application.

(c) A restriction shall be considered "necessary" only if it responds to a pressing public and social need, pursues a legitimate aim and is proportionate to that aim.

(d) A restriction based on "national security" may be invoked only in situations where the exercise of the right poses a clear, imminent and serious danger to the State. When this restriction is invoked on the ground that an individual acquired military secrets, the restriction shall be applicable only for a limited time, appropriate to the specific circumstances, which should not be more than five years after the individual acquired such secrets.

(e) A restriction based on "public order (ordre public)" shall be directly related to the specific interest which is sought to be protected. "Public order (ordre public)" means the universally accepted fundamental principles, consistent with respect for human rights, on which a democratic society is based.

(f) A restriction based on "the rights and freedoms of others" shall not imply that relatives (except for parents with respect to unemancipated minors), employers or other persons may prevent, by withholding their consent, the departure of any person seeking to leave a country.

(g) No fees, taxes or other exactions shall be imposed for seeking to exercise or exercising the right to leave a country, with the exception of nominal fees related to travel documents.

(h) Permissibility of restrictions on the right to leave is subject to international scrutiny. The burden of justifying any such restriction lies with the state.

Article 5

(a) Any person leaving a country shall be entitled to take out of that country

(1) his or her personal property, including household effects and property connected with the exercise of that person's profession or skill;

(2) all other property or the proceeds thereof, subject only to the satisfaction of legal monetary obligations, such as maintenance obligations to family members, and the general controls imposed by law to safeguard the national economy, provided that such controls do not have the effect of denying the exercise of the right.

(b) Property or the proceeds thereof which cannot be taken out of the country shall remain vested in the departing owner, who shall be free to dispose of such property or proceeds within the country.

RIGHT TO ENTER OR RETURN

Article 6

(a) No one shall be deprived of the right to enter his or her own country.

(b) No person shall be deprived of nationality or citizenship in order to exile or to prevent that person from exercising the right to enter his or her country.

(c) No entry visa may be required to enter one's own country.

Article 7

Permanent legal residents who temporarily leave their country of residence shall not be arbitrarily denied the right to return to that country.

Article 8

On humanitarian grounds, a state should give sympathetic consideration to permitting the return of a former resident, in particular a stateless person, who has maintained strong *bona fide* links with that state.

PROCEDURAL SAFEGUARDS

Article 9

Everyone has the right to obtain such travel or other documents as may be necessary to leave any country or to enter one's own country. Such documents shall be issued free of charge or subject only to nominal fees.

Article 10

(a) Any national procedures or requirements affecting the exercise of the rights set forth in this Declaration shall be established by law or administrative regulations adopted pursuant to law.

(b) Everyone shall have the right to communicate as necessary with any person, including foreign consular or diplomatic officials, for the realization of the rights set forth in this Declaration.

(c) No state shall refuse to issue the documents referred to in Article 9 or shall otherwise impede the exercise of the right to leave, on the ground of the applicant's inability to present authorization to enter another country.

(d) Procedures for the issuance of the documents referred to in Article 9 shall be expeditious and shall not be unreasonably lengthy or burdensome.

(e) Everyone filing an application for any document referred to in Article 9 shall be entitled to obtain promptly a duly certified receipt for the application filed. Decisions regarding issuance of such documents shall be taken within a reasonable period of time specified by law. The applicant shall be promptly informed in writing of any decision denying, withdrawing, cancelling or postponing issuance of any such document; the specific reasons therefor; the facts upon which the decision is based; and the administrative or other remedies available to appeal the decision.

(f) The right to appeal to a higher administrative or judicial authority shall be provided in all instances in which the right to leave or enter is denied. The appellant shall have a full opportunity to present the grounds for the appeal, to be represented by counsel of his or her choice, and to challenge the validity of any fact upon which a denial or restriction has been founded. The results of any appeal, specifying the reasons for the decision, shall be communicated promptly in writing to the appellant.

FINAL CLAUSES

Article 11

Any person claiming a violation of his or her rights set forth in this Declaration shall have effective recourse to a judicial or other independent tribunal to seek enforcement of those rights.

Article 12

No state may impede communication by any person with an international organization or other bodies or persons outside the state with regard to the rights set forth in this Declaration, and no sanction, penalty, reprisal or harrassment may be imposed on anyone exercising this right of communication.

Article 13

The enjoyment of the rights set forth in this Declaration shall not be limited because of activities protected under internationally recognized human rights or other international legal obligations.

Article 14

Nothing in this Declaration shall be interpreted as implying from any state, group or person any right to engage in any activity or perform any act aimed at destroying any of the rights set forth herein or at limiting them to a greater extent than is provided for in this Declaration.

Article 15

The present Declaration shall not be interpreted to limit the enjoyment of any human right protected by international law.

EXHIBIT 3

CONGRESSIONAL RESEARCH SERVICE
THE LIBRARY OF CONGRESS
Washington, DC, March 23, 1995.

American Law Division, Memorandum

Subject: Whether Legislation That Would Tax Property Upon Expatriation Constitutes a Violation of International Law

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This memorandum addresses whether legislation that would tax the property of American citizens who renounce their citizenship at the time of renunciation violates an international obligation of the United States under a treaty or other international agreement or customary international law. Because of the brevity of our deadline, this memorandum does not provide a detailed analysis of this question, but rather briefly examines some of the more salient international legal issues that might be implicated by such legislation.

Based on this preliminary analysis, there does not appear to be a clear international legal impediment to the enactment of the proposed legislation. First, the legislation applies upon the act of renunciation of citizenship and would thus only indirectly affect emigration. While a right to emigrate is recognized in national legal systems and in both binding and non-binding international legal instruments, there does not appear to be an obvious consensus on the content of this right and, moreover, international legal instruments recognize the right of emigration may be restricted for certain purposes. Additionally, the proposed tax would not appear to violate a norm of customary international law. It would seem to be relatively common in international practice for an individual to incur tax consequences as a result of his or her emigration or expatriation.

Proposed legislation. Section 5 of H.R. 831, 104th Cong., 1st Sess. (1995), as reported by the Senate Finance Committee, would amend federal income tax law to require that property held by a United States citizen who relinquishes his or her citizenship be treated as sold for its fair market value at the time of relinquishment and any gain or loss be taken into account for the taxable year (new 26 U.S.C. §877A). Certain exceptions and conditions would apply to the general rule. Items currently excluded from gross income under 26 U.S.C. §§102 et seq. would continue to be excluded, as would real property and interests in retirement plans. The amount of realized gain would be reduced (but not below zero) by $600,000.

A tentative tax would be due 90 days after the taxpayer relinquishes citizenship, but for good cause payment of tax may be extended by the Secretary of the Treasury for up to 10 years. An individual will be deemed to have relinquished his or her citizenship (1) on the date the individual renounces his or her United States nationality before a diplomatic or consular officer, furnishes the State Department a signed statement of voluntary relinquishment, or is issued a certificate of loss of nationality by the State Department or (2) for naturalized citizens, on the date a court cancels the citizen's certificate of naturalization.

Currently, nonresident aliens are subject to income tax on certain property for ten years after losing United States citizenship, unless the loss of citizenship did not have as one of its purposes the avoidance of federal or income or estate and gift taxes (26 U.S.C. §877). This law would cease to apply to any individual who relinquishes his or her citizenship on and after February 6, 1995 (new 26 U.S.C. §877(f)).

International agreements. With respect to the right of emigration, we can identify only one clearly binding international agreement to which the United States is a party that addresses the right to emigrate as possibly implicated here—namely, the International Covenant on Civil and Political Rights.

Article 12 of the Covenant, which entered into force for the United States on September 8, 1992, provides, in pertinent part, as follows:

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (''order public''), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

In submitting the Covenant to the Senate, the Executive Branch specifically stated that Article 12 ''guarantees . . . the right of emigration to all those lawfully within the territory of a State party.''[1]

The Convention does not make the right to emigrate an absolute one. The right may be restricted for, among other things, reasons of ''public order,'' a phrase roughly analogous to the concept of public policy and likely including such notions as ''economic order.''[2] Some commentary apparently indicates that States may certainly require that citizens pay normal tax obligations and public debts upon emigration,[3] but suggests that economic controls should not result in a de facto denial of the right to leave.[4]

The proposed legislation does not directly restrict the right of an individual to leave the United States and indeed covers individuals who may have already chosen to reside elsewhere. The tax would not be triggered by the mere act of leaving or residing abroad. It would be based on activities that occurred while the taxpayer was a citizen and appears to generally reflect amounts that for the most part would otherwise be payable upon death. The proposed tax obligation contains elements found in existing tax laws—for example, exclusions for items currently excludable from income tax under 26 U.S.C. §§101 et seq. (certain interest on state and local bonds, gifts and inheritances, etc.) and an exclusion of the first $600,000 of gain. Currently 26 U.S.C. §6018 requires an executor to file an estate tax return in all cases where the gross estate at the death of a citizen or resident exceeds $600,000. While current deferrals would apparently be eliminated, the possibility of deferred payment is not entirely foreclosed. Further, the tax burden would seem to be immediately lessened by the fact that certain real property and pension plans would be excluded.

Though curbs on expatriation may indirectly affect one's ability to emigrate, one may question, however, whether a restriction on expatriation would in fact restrict this right. The proposed tax does not, for example, amend current constitutional and statutory protection of a U.S. citizen's right to leave the country whether or not the tax is paid; in other words, the act of emigration would not appear to be conditioned on such payment. Moreover, it seems difficult to argue that a condition on U.S. expatriation would so affect foreign countries' willingness to accept U.S. citizens as residents that the right to leave the U.S. would be substantially impaired. More likely, there may be a number of foreign laws and regulations that could burden an individual who seeks to live elsewhere—e.g., restrictions on immigration, acquiring citizenship, eligibility for benefits.

Customary international law. Customary international law is defined as resulting ''from a general and consistant practice of states followed by them from a sense of legal obligation.[5] Further, a principle of customary international law would not bind a State that dissents from the norm while it is being developed nor if and when the practice evolves into a rule.[6] As stated in the Foreign Relations Restatement, whether a principle has achieved the status of an international legal norm would generally be determined by ''evidence appropriate to the particular source from which that rule is alleged to derive,''[7] and thus the most reliable evidence for customary law would be ''proof of state practice, ordinarily by reference to official documents and other indications of governmental action'' and similar proof regarding a nation's dissent from the principle.[8]

The Universal Declaration of Human Rights (a United Nations General Assembly Resolution) and the Final Act of the Conference of Security and Cooperation in Europe (Helsinki Final Act) state or incorporate the notion of freedom of emigration[9] and to this extent they may be said to articulate a generally recognized international human right. It appears to remain uncertain, however, whether the Universal Declaration is binding.[10] Further, the Helsinki Final Act is not intended to legally bind parties. Even assuming that the right to emigrate may be considered to be a norm of customary international law, it is unclear whether the proposed tax would violate that right, given the apparent lack of international consensus on the issue of taxes keyed to expatriation and state practice to the contrary.

As for the right of expatriation in general, the Universal Declaration of Human Rights provides that ''no one shall be denied the right to change his nationality'' (Art. 15(2)). Nevertheless, while the United States over 10 years ago recognized a right of expatriation in statute,[11] other countries appear to have expressed different views on the matter.[12]

More specifically, identifying customary international law that may restrict a State's ability to limit emigration and expatriation necessarily requires examination of State taxation practices that affect those acts. A recent Joint Committee on Taxation staff document indicates that policies that attach

Footnotes at end of article.

tax consequences to emigration are common.[13] Many countries, including the United States, continue to impose income and capital gains tax liability on former residents (including citizens) after they emigrate. Commonly, this income and gains are also fully taxable in the new country of residence, and a recent emigre may face significantly higher taxation than would have been incurred had he or she not emigrated. Additionally Australia and Canada already tax an emigre's property upon emigration. Denmark and Germany also deem some types of property to have been sold upon emigration for tax purposes. In addition, United States bilateral income tax treaties generally contain a provision reserving a right on the part of the United States to tax for a period of ten years the property of a former citizen who is resident in the territory of the treaty partner.[14] Entry into the treaty obligation would appear to indicate at least some foreign acquiescence in this practice. In sum, the ''expatriation tax'' under consideration would not appear to inhibit international movement in ways that current international tax practice already does not.

Jackson-Vanik Amendment. The Jackson-Vanik Amendment, which makes nonmarket economy (NME) countries that do not meet statutory freedom-of-emigration standards ineligible for United States trade and financial benefits,[15] would not appear to provide sufficient evidence of the kind of state practice that is needed to create a customary rule of international law regarding the type of tax that is being proposed here. Three types of conduct are addressed by the Amendment: (1) denying citizens the right or opportunity to emigrate; (2) imposing more than a nominal tax on emigration or on the visas or other documents required for emigration, for any purpose or cause whatsoever; and (3) imposing more than a nominal tax, levy, fine, fee, or other charge on any citizen as a consequence of the desire of such citizen to emigrate to the country of his choice.[16] While the statute specifically incorporates language regarding the right to emigrate and defines unacceptable restrictions on that right, placing Jackson-Vanik-type requirements on trading partners would appear to be unique to the United States. Further, the targeted taxes are specifically related to emigration, rather than to expatriation and, moreover, clearly apply in an overly restrictive manner. They include fees for passport applications and exit visas that are ordinarily prohibitive when measured against average income.[17] These are far removed from the kind of tax proposed in H.R. 831, which, among other things, applies to individuals who have incurred a tax burden because of actions that would generally implicate tax laws absent renunciation of citizenship, affects taxpayers with untaxed capital gains in excess of $600,000, and, if the Internal Revenue Service agrees, might be payable on a deferred basis.

FOOTNOTES

[1] Senate Exec. E, 95th Cong., 2d Sess. xii (1977).

[2] See Kiss, ''Permissible Limitations on Rights,'' in L. Henkin, ed., The International Bill of Rights 290, 299–302 (1981); M. Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary 212–214 (1993)[hereinafter cited as Nowak].

[3] The Movement of Persons Across Borders 82 (Sohn & Buergenthal eds. 1992), as cited in Prepared Statement of Robert F. Turner Before the Subcommittee on Taxation and IRS Oversight, Senate Comm. on Finance, March 21, 1995, at 8. We have been unable to consult this treatise directly.

[4] See, e.g., H. Hannum, ''The Right to Leave and Return in International Law and Practice 39–40 (1987); cf. Nowak, supra note 2, at 213–14.

[5] American Law Institute, Restatement (Third) of the Foreign Relations Law of the United States §102(2) (1987)[hereinafter cited as Foreign Relations Restatement]; see also Statute of the International Court of Justice, Art. 33(1).

[6] Id. at Comments b and d.

[7] Id. §103(1).

[8] Id. at Comment a.

[9] The International Declaration of Human Rights provides at Article 13(2) that ''everyone has the right to leave any country, including his own.'' The Final Act of the Conference on Security and Co-operation in Europe, August 1, 1975 (Helsinki Final Act), provides that ''the participating States will act in conformity with the purposes of the Charter of the United Nations and with the Universal Declaration of Human Rights. They will also fulfil their obligations as set forth in the international declarations and agreement in this field, including inter alia, the International Covenants on Human Rights, by which they may be bound.'' Helsinki Final Act, Declaration on Principles Guiding Relations Between States, ¶VII.

[10] Foreign Relations Restatement, supra note 5, at §701, Reporters' Note 6.

[11] Expatriation Act of July 27, 1868, 15 Stat. 223, 8 U.S.C. §1481 note.

[12] W. Bishop, International Law 526 (3d ed. 1971); Foreign Relations Restatement, supra note 5, at §211, Reporters' Note 4.

[13] Joint Committee on Taxation Staff Document (JCX–14–95) on Background and Issues Relating to Taxation of U.S. Citizens Who Relinquish Citizenship, Prepared for Senate Finance Committee Hearing March 21, 1995, at 8–11 [hereinafter cited as Joint Committee Document], as reprinted in Daily Tax Reporter, No. 55, L–11, L–15—L–16 (March 22, 1995).

[14] Joint Committee Document, supra note 13, at 16, as reprinted in Daily Tax Reporter, March 22, 1995, at L–18.

[15] 19 U.S.C. §2432.

[16] 19 U.S.C. §2432(a).

[17] Joint Committee Document, supra note 13, at 18, as reprinted in Daily Tax Reporter, March 22, 1995, at L–19.

SECTION 201 OF TAX COMPLIANCE ACT OF 1995: CONSISTENCY WITH INTERNATIONAL HUMAN RIGHTS LAW

The Department of State believes that Section 201 of the proposed Tax Compliance Act of 1995 is consistent with international human rights law. As described below, closing a loophole that allows extremely wealthy people to evade U.S. taxes through renunciation of their American citizenship does not violate any internationally recognized right to leave one's country. It is inaccurate on legal and policy grounds to suggest that the Administration's proposal is analogous to efforts by totalitarian regimes to erect financial and other barriers to prevent their citizens from leaving. The former Soviet Union, for example, sought to impose such barriers only on people who wanted to leave, and not on those who stayed. In contrast. Section 201 seeks to equalize the tax burden born by all U.S. citizens by ensuring that all pay taxes on gains above $600,000 that accrue during the period of their citizenship. Unlike the Soviet effort to discriminate against people who sought to leave, the purpose of Section 201 is to treat those who renounce their U.S. citizenship on the same basis as those who remain U.S. citizens.

Section 201 would require payments of taxes by U.S. citizens and long-term residents on gains above $600,000 that accrue immediately prior to renunciation of their U.S. citizenship or long-term residency status. These tax requirements are similar to those that they would face if they remained U.S. citizens or long-term residents at the time they realized their gains or at death. While U.S. tax policy generally allows taxpayers to defer gains until they are realized or included in an estate, we understand from the Department of the Treasury that Section 201 treats renunciation as a taxable event because such act effectively removes the underlying assets from U.S. taxing jurisdiction.

International law recognizes the right of all persons to leave any country, including their own, subject to certain limited restrictions. Article 12(2) of the International Covenant on Civil and Political Rights provides that: ''Everyone shall be free to leave any country, including his own.'' Article 12(3) states that the right ''shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (order public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.''

Section 201 does not affect a person's right to leave the United States. Any tax obligations incurred under Section 201 would be triggered by the act of renunciation of U.S. citizenship, and not by the act of leaving the United States. In addition, since during peacetime U.S. citizens must be outside the United States to renounce their citizenship (see 8 U.S.C. Secs. 1481(a)(5), 1483(a)) the persons affected by Section 201 would have already left the United States. Renunciation does not preclude them from returning to the United States as aliens and subsequently leaving U.S. territory. Accordingly, Section 201 does not affect a person's right or ability to leave the United States.

Inherent in the right to leave a country is the ability to leave permanently, i.e., to emigrate to another country willing to accept the person. The proposed tax is as unconnected to emigration as it is to the right to leave the United States on a temporary basis. It is not the act of emigration that triggers tax liability under Section 201, but the act of renunciation of citizenship. These two acts are not synonymous and should not be confused with one another. Because the United States allows its citizens to maintain dual nationality, U.S. citizens may emigrate to another country and retain their U.S. citizenship. Hence, the act of emigration itself does not generate tax liability under Section 201. Indeed, we understand from the Department of the Treasury that some of the people potentially affected by Section 201 already maintain several residences abroad and hold foreign citizenship. Moreover, in stark contrast to most emigrants, particularly those fleeing totaliatarian regimes, some continue to spend up to 120 days each year in the United States after they have renounced their U.S. citizenship.

While emigration from the United States should not be confused with renunciation of U.S. citizenship, it should nonetheless be noted that it is well established that a State can impose economic controls in connection with departure so long as such controls do not result in a de facto denial of emigration. As Professor Hurst Hannum notes in commenting on the restrictions on the right to leave set forth in Article 12 of the Covenant:

''Economic controls (currency restrictions, taxes, and deposits to guarantee repatriation) should not result in the de facto denial of an individual's right to leave . . . If such taxes are to be permissible, they must be applied in a non-discriminatory manner and must not serve merely as a pretext for denying the right to leave to all or a segment of the population (for example, by requiring that a very high 'education tax' be paid in hard currency in a country in which possession of hard currency is illegal).''[1]

A wealthy individual who is free to travel and live anywhere in the world, irrespective of nationality, is in no way comparable to that of a persecuted individual seeking freedom who is not even allowed to leave his or her country for a day. In U.S. law, the Jackson-Vanik amendment to the Trade Act of 1974 (19 U.S.C. Sec. 2432) is aimed at this latter case and applies to physical departure, not change of nationality. Examples of States' practices that have been considered to interfere with the ability of communist country citizens to emigrate include imposing prohibitively high taxes specifically applied to the act of emigration with no relation to an individual's ability to pay, or disguised as ''education taxes'' to recoup the State's expenses in educating those seeking to depart permanently. Such practices also include punitive actions, intimidation or reprisals against those seeking to emigrate (e.g., firing the person from his or her job merely for applying for an exit visa). It is these offensive practices that the Jackson-Vanick amendment is designed to eliminate and thereby ensure that the citizens of all countries can exercise their right to leave. (See Tab A for further analysis of the Jackson-Vanik amendment.)

The only international human rights issue that is relevant to analysis of Section 201 is whether an internationally recognized right to change citizenship exists and, if so, whether Section 201 is consistent with it. The Universal Declaration of Human Rights, which is in many respects considered reflective of customary international law, provides in Article 15(2) that: ''No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality'' (emphasis added).[2] Although many provisions of the Universal Declaration have been incorporated into international law, for example in the International Covenant on Civil and Political Rights, Article 15(2) is not. Accordingly, the question arises whether this provision could be considered to be customary international law.

States' views on this question and practices do vary. Many countries have laws governing the renunciation of citizenship, but renunciation is not guaranteed because they have also established preconditions and restrictions, or otherwise subject the request to scrutiny.[3] Professor Ian Brownlie has commented on Article 15(2) in the context of expatriation that: ''In the light of existing practice, however, the individual does not have this right, although the provision in the Universal Declaration may influence the interpretation of internal laws and treaty rules.''[4] Others agree with this position. (See Restatement of the Foreign Relations Law of the United States, Sec. 211, Reporters' Note 4). Nonetheless, the United States believes that individuals do have a right to change their nationality. The U.S. Congress took the view in 1868 that the ''right of expatriation is a natural and inherent right of all people'' in order to rebut claims from European powers that ''such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof. . . .'' (Rev. Stat. Sec. 1999).

It is evident, however, that States do not recognize an unqualified right to change nationality. It is generally accepted, for example, that a State can require that a person seeking to change nationality fulfill obligations owed to the State, such as pay taxes due or perform required military service.[5] This is especially true where—as here—the requirement is by its nature proportional to the means to pay, and thus does not present a financial barrier.

The consistency between Section 201 and international human rights law is further demonstrated by the practice of countries that are strong supporters of international human rights and that have adopted similar tax policies. According to the Report prepared by the Staff of the Joint Committee on Taxation, Germany imposes an ''extended tax liability'' on German citizens who emigrate to a tax-haven country or do not assume residence in any country and who maintain substantial economic ties to Germany. Australia imposes a tax when an Australian resident leaves the country; such person is treated as having sold all of his or her non-Australian assets at fair market value at the time of departure. To provide another example, Canada considers a taxpayer to have disposed of all capital gain property at its fair market value upon the occurrence of certain events, including relinquishment of residency.

Accordingly, Section 201 would not raise concerns with respect to change of citizenship for two reasons. First, U.S. citizens would remain free to choose to change their citizenship. This proposal does not in any way preclude such choice, even indirectly. Any tax owed, by its nature, applies only to gains and thus should not exceed an individual's ability to pay. Second, international law would not proscribe reasonable consequences of relinquishment, such as liability for U.S. taxes that accrue during the period of citizenship. We understand from the Department of the Treasury that the imposition of taxes under Section 201 would be equitable, reasonable and consistent with overall U.S. tax policy. We are aware of no evidence that would suggest otherwise. The tax, as we understand it, applies only to gains that accrued during the period of citizenship in excess of $600,000; the tax rate is consistent with other tax rates; and affected persons have the financial means to pay the tax. Indeed, were these persons to choose to retain their U.S. citizenship, they would have to pay similar taxes upon realization of their gains or upon death. Obviously, there is no international right to avoid paying taxes by changing one's citizenship.

In conclusion, it is the view of the Department of State that Section 201 does not violate international human rights law. Accordingly, the debate on the merits of Section 201 should focus solely on domestic tax policies and priorities.

FOOTNOTES

[1] H. Hannum, ''The Right to Leave and Return in International Law and Practice'' 39–40 (1987).

[2] Article XIX of the American Declaration on the Rights and Duties of Man provides that: ''Every person has the right to the nationality to which he is entitled by law and to change it, if he so wishes, for the nationality of any other country that is willing to grant it to him.'' The Declaration is not a treaty and has not itself acquired legally binding force.

[3] See Coumas v. Superior Court in and for San Joaquin County (People, Intervenor), 192 P. 2d 449, 451 (Sup. Ct. Calif. 1948). When confronted with Greek refusal to consent to an expatriation, the Supreme Court of California stated: ''. . . The so-called American doctrine of 'voluntary expatriation' as a matter of absolute right cannot postulate loss of original nationality on naturalization in this country as a principle of international law, for that would be tantamount to interference with the exclusive jurisdiction of a nation within its own domain.''

[4] I. Brownlie, ''Principles of International Law'' (4th ed.) 557 (1990). Professor Lillich comments that ''the right protected in [Article 15] has received very little subsequent support from states and thus can be regarded as one of the weaker rights . . . '' ''Civil Rights,'' in T. Meron, ''Human Rights in International Law'' at 153–154 (1988).

[5] A State should not, for example, withhold discharge from nationality if, inter alia, acquisition of the new nationality has been sought by the person concerned in good faith and the discharge would not result in failure to perform specific obligations owed to the State. P. Weis, ''Nationality and Statelessness in International Law'' (2nd ed.) 133 (1979). In Coumas, supra note 3, the Supreme Court of California observed that Greece qualified the right of expatriation on fulfillment of military duties and procurement of consent of the Government.

TAB A

Section 201 of the proposed Tax Compliance Act of 1995 does not conflict with the Jackson-Vanik amendment to the Trade Act of 1974 (19 U.S.C. §2432). That amendment restricts granting most-favored-nation treatment and certain trade related credits and guarantees to a limited number of nonmarket economies that unduly restrict the emigration of their nationals. Specifically, it applies to any nonmarket economy which:

''(1) Denies its citizens the right or opportunity to emigrate;

''(2) Imposes more than a nominal tax on emigration or on the visas or other documents required for emigration, for any purposes or cause whatsoever; or

''(3) Imposes more than a nominal tax, levy, fine, fee or other charge on any citizen as a consequence of the desire of such citizen to emigrate to the country of his choice * * *.''

This provision, according to the Senate Finance Committee, was ''intended to encourage free emigration of all peoples from all communist countries (and not be restricted to any particular ethnic, racial, or religious group from any one country). (1974 U.S.C.C.A.N. 7338.) These countries were expected to ''provide reasonable assurances that freedom of emigration will be a realizable goal'' if they were to enter into bilateral trade agreements with the United States. (Id.)

The amendment does not apply to emigration from the United States or to the renunciation of U.S. citizenship. It has been suggested, however, that Section 201 would somehow conflict with the ''spirit'' or the ''principles'' of the Jackson-Vanik amendment. The Department of State does not agree with such proposition.

Generally, in implementing this statute, the President makes determinations concerning a nonmarket economy's compliance with freedom of emigration principles contained in the amendment. Such determinations take into account the country's statutes and regulations, and how they are implemented day to day, as well as their net effect on the ability of that country's citizens to emigrate freely. The President may, by Executive Order, waive the prohibitions of the Jackson-Vanik amendment if he reports to Congress that a waiver will ''substantially promote'' the amendment's freedom of emigration objectives, and that he has received assurances from the country concerned that its emigration practices ''will henceforth lead substantively to the achievement'' of those objectives. (19 U.S.C. sec. 2431(c).)

Several types of State practices have been considered by the United States to interfere with the ability of communist country citizens to emigrate, such as:

Prohibitively high taxes specifically applied to the act of emigration with no relation on an individual's ability to pay or disguised as ''education taxes'' seeking to recoup the state's expenses in educating those who are seeking to permanently depart;

Punitive actions, intimidation or reprisals by the State against those seeking to emigrate (e.g., firing a person from his or her job merely for applying for an exit visa);

Unreasonable impediments, such as requiring adult applicants for emigration visas to obtain permission from their parents or adult relatives;

Unreasonable prohibitions of emigration based on claims that the individual possesses knowledge about state secrets or national security; and

Unreasonable delays in processing applications for emigration permits or visas, interference with travel or communications necessary to complete applications, withholding of necessary documentation, or processing applications in a discriminatory manner such as to target identifiable individuals or groups for persecution (e.g., political dissidents, members of religious or racial groups, etc.).

Examples of these practices in the context of the former Soviet Union are described in an exchange of letters between Secretary of

State Kissinger and Senator Jackson of October 18, 1974, discussing freedom of emigration from the Soviet Union and Senator Jackson's proposed amendment to the Trade Act, now known as the Jackson-Vanik amendment. (Reprinted in 1974 U.S.C.C.A.N. 7335–38.)

As explained in the accompanying memorandum, Section 201 does not deny anyone the right or ability to emigrate, and does not impose a tax on any decision to emigrate. Neither does the proposed tax raise questions of disparate standards applicable to the United States as against the nonmarket economies subject to Jackson-Vanik restrictions.

The emigration practices of those countries which have been the target of Jackson-Vanik restrictions have typically involved individuals or groups that have been persecuted by the State (e.g., dissidents), precluded family reunification, applied across the board to all citizens by a totalitarian State in order to preclude massive exodus, or have otherwise been so restrictive as to effectively prevent the exercise of the international right to leave any country including one's own (as recognized in Article 12(2) of the International Covenant on Civil and Political Rights and further described in the accompanying memorandum). Furthermore, the primary objectives of those seeking to emigrate from those countries have been to avoid further persecution or to be reunified with their relatives, and to leave permanently. It was the act of leaving for any period of time that the State sought to block. None of these conditions are comparable to the exercise of taxing authority by the United States under Section 201 or to the status of individuals who would be subject to that tax.

As stated in the accompanying memorandum, Section 201 would not interfere with the right of an individual to physically depart from the United States, whether temporarily or permanently.

TUFTS UNIVERSITY, THE FLETCHER SCHOOL OF LAW AND DIPLOMACY,
March 31, 1995.

Hon. DANIEL PATRICK MOYNIHAN,
U.S. Senate.
Attention: Patricia McClanahan,
Re Tax Compliance Act of 1995, H.R. 981.

DEAR SENATOR MOYNIHAN: I wrote you on 24 March expressing my concern over the possible human rights implications of the so-called ''exit tax'' called for in the above-referenced bill. As I noted then, what appeared to be the imposition of a tax solely on the ground that a person was renouncing his or her citizenship could interfere with the right of every person ''to leave any country, including his own,'' which is guaranteed under article 12 of the Covenant on Civil and Political Rights.

I am gratified that the human rights issues related to this bill have become a subject of serious debate, and I appreciate your contribution to that debate. Having now received additional and more specific information about the tax, however, I have become convinced that neither its intention nor its effect would violate present U.S. obligations under international law.

Although imposition of a special tax on those who wished to renounce U.S. citizenship might be questionable, it is my understanding that the tax in question is based on accrued income and, in effect, treats renunciation of citizenship as the financial equivalent of death for the purpose of attaching tax liability. There are undoubtedly negative consequences to the individual concerned in having to pay taxes on gains while he or she is alive rather than after death, but there is no internationally protected right to escape taxation by changing citizenship. However, in order to clarify that the purpose and effect of the proposed tax are non-discriminatory, the language might be rewritten to offer the individual the option of complying with the new tax or electing to have realized gains taxed only as part of the individual's estate—subject to an appropriate escrow account being established for money which would be otherwise be expected to be beyond U.S. jurisdiction at the time of death.

In sum, imposition of a non-discriminatory tax on accrued income at the time citizenship is renounced, in a manner consistent with the way in which that same income would be treated at the time of death, does not appear to me to violate either the internationally protected right to emigrate or the (somewhat less well protected) right to a nationality.

Thank you for the opportunity to clarify my views on this important matter.

Yours sincerely,

HURST HANNUM,
Associate Professor of International Law.

The PRESIDING OFFICER (Mrs. KASSEBAUM). The question is on agreeing to the amendment of the Senator from Massachusetts. On this question, the yeas and nays have been ordered, and the clerk will call the roll.

The bill clerk called the roll.

The PRESIDING OFFICER. Are there any other Senators in the Chamber who desire to vote?

The result was announced—yeas 96, nays 4, as follows:

[Rollcall Vote No. 128 Leg.]

YEAS—96

Abraham	Feingold	Lugar
Akaka	Feinstein	McCain
Ashcroft	Ford	McConnell
Baucus	Frist	Mikulski
Bennett	Glenn	Moseley-Braun
Biden	Gorton	Moynihan
Bingaman	Graham	Murkowski
Bond	Grams	Murray
Boxer	Grassley	Nickles
Bradley	Gregg	Nunn
Breaux	Harkin	Packwood
Brown	Hatch	Pell
Bryan	Hatfield	Pressler
Bumpers	Heflin	Pryor
Burns	Helms	Reid
Byrd	Hollings	Robb
Campbell	Hutchison	Rockefeller
Chafee	Inhofe	Roth
Coats	Inouye	Santorum
Cochran	Jeffords	Sarbanes
Cohen	Johnston	Shelby
Conrad	Kassebaum	Simon
Coverdell	Kempthorne	Simpson
D'Amato	Kennedy	Smith
Daschle	Kerrey	Snowe
DeWine	Kerry	Specter
Dodd	Kohl	Stevens
Dole	Lautenberg	Thomas
Domenici	Leahy	Thompson
Dorgan	Levin	Thurmond
Exon	Lieberman	Warner
Faircloth	Lott	Wellstone

NAYS—4

Craig	Kyl
Gramm	Mack

So, the amendment (No. 448) was agreed to.

Mr. KENNEDY. Madam President, I move to reconsider the vote by which the amendment was agreed to.

Mr. LOTT. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. LOTT. Madam President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. WELLSTONE. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

AMENDMENT NO. 567 TO AMENDMENT NO. 420

(Purpose: To make $10,000,000 of nutrition services and administration funds for WIC to promote immunizations)

Mr. BUMPERS. Madam President, I send an amendment to the desk.

The PRESIDING OFFICER. Without objection, the pending amendments will be set aside. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Arkansas [Mr. BUMPERS] proposes an amendment numbered 567 to amendment No 420.

Mr. BUMPERS. Madam President, I ask unanimous consent that the reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

''SPECIAL SUPPLEMENTAL FOOD PROGRAM FOR WOMEN, INFANTS, AND CHILDREN (WIC)

''The paragraph under this heading in Public Law 103–330 (108 Stat. 2441) is amended by inserting before the period at the end, the following:

'': *Provided further,* That notwithstanding any other provision of law, up to $10,000,000 of nutrition services and administration funds may be available for grants to WIC State agencies for promoting immunization through such efforts as immunization screening and voucher incentive programs.''

Mr. BUMPERS. Madam President, this is an amendment that was part of the law last year and should be part of the bill this year. It allows up to $10 million in WIC administrative expenses to be used for incentives for immunizing children prior to the age of 2 years.

This has been cleared by Senator COCHRAN, who is chairman of the Appropriations Committee on Agriculture where this resides, and with the distinguished chairman of the full Appropriations Committee.

Mr. HATFIELD addressed the Chair.

The PRESIDING OFFICER. The Senator from Oregon.

Mr. HATFIELD. Madam President, the Senator is correct. The matter has been cleared by our side of the aisle, by the subcommittee chair, and the Senator from Arkansas is the ranking member of that subcommittee.

The PRESIDING OFFICER. The question is on agreeing to the amendment.

The amendment (No. 567) was agreed to.

Mr. BUMPERS. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. FORD. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. WELLSTONE. Madam President, I ask unanimous consent that I be able to speak for 10 minutes as in morning business.

Mr. LOTT. Madam President, the Senator is not offering an amendment, he is just going to speak in morning business?

Mr. WELLSTONE. Madam President, the Senator from Mississippi is correct.

The PRESIDING OFFICER. Without objection, it is so ordered.

VIOLENCE IN AMERICA

Mr. WELLSTONE. I thank the Chair.

Madam President, I come before the Senate today to underscore the commitment that we must make to end domestic violence in America.

Beginning today, every time a person in my State of Minnesota dies at the hands of an abuser, I will make sure that their story becomes part of the CONGRESSIONAL RECORD. I do this so that we all remember how deeply this violence scars our society and, most importantly, as a reaffirmation of our commitment to ending domestic violence.

Indeed, if we are ever going to stop the violence in our communities and in our workplaces and on the street, we must begin in the home.

I am here today with evidence that the brutal violence continues, and while it continues to be the single most important or the single most significant cause of injury to women, this violence knows no boundaries of age or gender or race or geography or income or education. The violence goes on year after year, generation after generation.

In Minnesota in 1994, at least 19 women and 7 children were killed brutally by a spouse or former partner. With pain, but also with great determination, I ask that we honor the memory of the following individuals, and from my heart, I ask that we work to end the kind of violence that has cost these individuals, their families and their communities so much:

Pamela Bennett, 34 years of age, January 5, Bemidji, MN. Pamela and her boyfriend of Bemidji were traveling together in Oregon when they stopped at a rest stop. Hoagland reported to authorities that a hit-and-run driver struck Pamela at the rest stop as she exited the restroom. She was dead upon arrival at the hospital. When police found no evidence of an accident, Hoagland told authorities that he had lied about the accident and that she fell beneath their travel trailer as he pulled away from the rest stop without her. Hoagland was charged with filing a false police report, assault and harassment. In late March, Hoagland pleaded guilty to misdemeanor charges in her death. He was sentenced to 5 months in jail.

Pamela Kay Currie, 45, January 14, St. Francis, MN. Pamela was found stabbed to death in her home by police who were called by her husband, Gary Currie. He reported awaking in the morning and finding his wife dead on the bed and a knife sticking out of his own chest. He told authorities he remained in bed for almost a whole day before calling 911 because he hoped he would die. Curry was charged with second-degree murder.

Mary Sue Oberender, 46, February 16, Watertown, MN. Mary Sue was found shot to death in her home by her husband, Lawrence. Authorities discovered the car in Minneapolis and, within a half an hour, arrested two youths. The youths, Mary Sue's teenage son, Christian, 14, and a friend, also 14, were arrested. They indicated the shooting stemmed from a minor difference one of them had had with the mother. Police said the shooting appeared somewhat planned, as if by ambush. There were no signs of struggle. Mary Sue was a volunteer for Scouts at a local elementary school. Her husband is a Watertown-Mayer school board member.

Gertrude Bestor, 86, February 19, Granger, MN.

And finally, some murders of children:

Lydia Healy, 4 years of age. Police officers found Lydia lying on her living room floor after her mother, Judey Healy, reported to police that Lydia wasn't breathing. Lydia was hospitalized for 8 days before she died. Her injuries included massive swelling of the brain caused by shaking or hitting; large black-and-blue marks on the tops of her feet; marks on her legs; bruises on her stomach and chest; a burned hand; bruises on her face; two large welts above an eye and on her cheek; and a burn or cut on her chin. Lydia's 11-year-old brother told police that his mother beat Lydia with a spatula and was left sitting in a bathtub of cold water. The next morning, neither he nor his mother were able to wake Lydia. Judey Healy was charged with second-degree murder.

Geneva Broaden, 15, March 10, 1995, St. Paul. Alfred Robinson, 51, the live-in companion of Geneva's mother, summoned authorities to their home and reportedly confessed to beating Geneva. Robinson told police he punched Geneva and kicked and stomped on her after she fell down because of a dispute over use of the telephone. When found, Geneva was not breathing and was transported to a medical center where she was pronounced dead. Police described the assault as "a very vicious attack."

Adriana Whiteside, age 4, March 11, 1995, St. Paul. Adriana was found stabbed inside her father's apartment. She was stabbed near her heart with a pocketknife and was rushed to the hospital where she died a short time later. A 14-year-old boy, Randy Burgess, who was babysitting Adriana and her infant stepsister, was seen by neighbors running through the building, carrying Adriana screaming, "Call 911. I stabbed a baby." He was arrested at the scene. He allegedly told police he was planning to kill someone when he found himself alone with Adriana. Randy Burgess was charged with intentional second-degree murder.

And finally, Jessica Turner, age 8, March 31, 1995, St. Paul. Jessica died after being stabbed in the chest and tumbling down a flight of stairs in her parent's apartment. Her stepfather, who had been released from a chemical dependency center on March 24, was drinking when he allegedly stabbed Jessica and her mother. He was found 5 hours after the stabbings, arrested and was charged with second-degree murder and attempted second-degree murder.

Madam President, as I went over the names of these Minnesotans who died at the hands of an abuser—and as I say, I want their story to become a part of the CONGRESSIONAL RECORD because I want us to honor them, I want us to make a commitment to stopping this violence—I realize that I did not read the circumstances of Gertrude Bestor, 86.

Gertrude's daughter went to her mother's house after a signal had been sounded by Gertrude's medical alert alarm. As she approached the house, she saw a pickup truck speeding away and found Gertrude lying on her bedroom floor beaten to death.

The daughter recognized the truck as belonging to Gertrude's step-great-grandson. He was arrested about an hour later after police stopped him in his pickup truck and noticed bloodstains on his clothes and hands. He was charged with two counts of second-degree murder and a count of first-degree murder.

Madam President, I would like to end this presentation with a quote from my wife, Sheila:

> We will not tolerate the violence, we will not ignore the violence, we will no longer say it is someone else's responsibility.

I urge all of my colleagues, and I have two great colleagues out here on the floor with me right now, the Senator from Oregon and the Chair, the Senator from Kansas, to work with the survivors, the advocates, the medical professionals, the justice system in our own States, and to support full community involvement in ending the violence.

I urge my colleagues, Democrats and Republicans alike, to work with passion and conviction to make this a priority for our work of the Senate. We must do everything we can to make homes the safest places that they can be. I yield the floor.

Mr. HATFIELD. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. LEVIN. Madam President, I ask unanimous consent that the order for the quorum call be rescinded and I be allowed to proceed in morning business for 8 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.